In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

INDEX

	Page
Relevant Docket Entries—Supreme Court, State of Colorado	1
Application for Writ in the Nature of Prohibition, filed July 2, 1970	2
Receipt for Application	6
Order of the District Court in and for Water Division No. 5, State of Colorado	6
Memorandum of Points and Authorities in Support of Motion to Quash Service	10
Notice to All Persons Interested in Water Applications in Water Division No. 5	17
Notice from Clerk's Office, Supreme Court, State of Colorado	25
Order Denying Application for Writ in the Nature of Prohibition, July 9, 1970	27
Order of the Supreme Court of the United States Granting Petition for a Writ of Certiorari	28

413-471—71——1

[Supreme Court, State of Colorado, Certified To Be a Full, True, and Correct Copy, Dec. 8, 1970, Richard D. Turelli, Clerk of the Supreme Court (Court Seal) By Richard D. Smith, Deputy Clerk]

THE UNITED STATES OF AMERICA

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Relevant Docket Entries

ORIGINAL PROCEEDING

1970	Docketed: July 2, 1970
July 2	Application for Writ in the Nature of Prohibition filed.
July 9	Above application denied.
	Closed July 24, 1970, List Full
Nov. 16	Copy of order of U.S. Supreme Court Granting a stay of proceedings in Water Division No. 5 filed.

Application for Writ in the Nature of Prohibition

[Supreme Court, State of Colorado, Certified To Be a Full, True, and Contract Copy, Dec. 8, 1970, Richard D. Turelli, Clerk of the Supreme Court (Court Seal) By Evelyn J. Olive, Deputy Clerk]

[Filed in the Supreme Court of the State of Colorado, Jul. 2, 1970, Richard D. Turelli]

No. 24821

In the Supreme Court of the State of Colorado

THE UNITED STATES OF AMERICA

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION No. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Application for Writ in the Nature of Prohibition

The United States of America by its undersigned attorneys, United States Attorney James L. Treece, Assistant Attorney General Shiro Kashiwa, Assistant Chief, Appellate Section, Edmund B. Clark, Assistant United States Attorney Leonard W. D. Campbell, and Attorney, Department of Justice Robert H. Whaley, PRAYS that an alternative Writ in the Nature of Prohibition issue out of this Court to the District Court in and for Water Division No. 5, State of Colorado and the Judge thereof, the Honorable Clifford H. Darrow, and the Water Referee thereof, prohibiting said Court, Judge and Referee from asserting jurisdiction over the United States, from adjudicating any water rights of the United States or from purporting to bind the United States in In the Matter of the Applications for Water Rights, Changes for Water Rights, Etc., Filed in Said Court for the Months of December, 1969, and January, 1970, Case No. Misc. § 1, for the reason that said Court and Judge are wholly without jurisdiction over the United States. The grounds for this application and the circumstances out of which it arose are as follows:

(1) On February 11, 1970, the Attorney General received by mail a paper signed by the water clerk of Water Division No. 5 directed to "All persons interested in Water Applications filed in said Water Division No. 5." The paper first notified the reader that "The following is a resume of all applications filed in the Office of the Water Clerk during the month of December, 1969." There followed a list of water right applications giving brief descriptions of the water use, means of water use, and applicant. The paper concluded with a statement that "You

are further notified that you have until the last day of March, 1970 to file with the water clerk a verified statement of opposition to any such applications, if you desire to oppose any such applications." Similar papers have been received listing applications filed during the months of January, February, March, April and May. A copy of the December resume is attached hereto.

(2) The mailing of the resume was purportedly for the purpose of fulfilling the service requirements of 43 U.S.C. Section 666 (66 Stat. 560, known as the McCarren Amendment) whereby the United States has consented to be joined as a defendant in certain general water adjudications.

(3) In response to the receipt of the December, 1969, resume, the United States filed with the Water Court of Water Division No. 5 a Motion to Quash Service challenging the jurisdiction of the court over the United States on the grounds that:

(a) The proceedings based on said applications do not constitute the kind of water right adjudication suit with respect to which the United States has consented to be sued.

(b) The purported "service" of the said resume does not constitute "service of process" within the meaning and contemplation of 43 U.S.C. § 666.

(4) In support of the Motion to Quash, the United States filed a Memorandum of Points and Authorities, a copy of which is attached hereto.

(5) The Motion to Quash was heard before Judge Clifford H. Darrow on April 9, 1970.

(6) In an opinion dated April 21, 1970, the Motion to Quash was overruled by Judge Darrow. A copy of the opinion is attached hereto.

(7) For the reasons summarized in the Motion to Quash and in the Memorandum of Points and Authorities submitted herewith, the proceedings before the Water Referee in Water Division No. 5 are not proceedings to which the United States has consented to be sued under 43 U.S.C. § 666 or any other statute and, therefore, said Water Referee, Water Court, and Judge cannot lawfully attempt to assert jurisdiction over the United States.

(8) The pending Water Referee proceedings in Water Division No. 5 purports to require the United States to make monthly voluntary appearances to protest new water right

applications upon penalty of losing all protection afforded to its water uses as affected by the water uses for which a water right application has been filed.

(9) There is no provision in the water referee proceeding for a general adjudication of all water rights of the water uses on a stream system wherein the water uses of the United States may be determined *inter sese* with all other water uses.

(10) That purporting to join the United States to a proceeding wherein, when served, it can only appear in the posture of filing a statement in opposition to other applications, attempts to bind the United States to a decree confirming other water uses without simultaneously determining *inter sese* the water rights of the United States, thereby attempting to deny recognition of the water rights of the United States.

(11) That the receipt of resumes for Water Divisions Nos. 4, 5 and 6 for water referee proceedings indicates that an attempt is being made to bind the United States in proceedings wherein its rights are not considered or recognized,

(12) There is pending in the United States Supreme Court a Writ of Certiorari to review the decision rendered by this Court in *The United States of America* v. *The District Court in and for the County of Eagle and State of Colorado, and the Judge Thereof, The Honorable William H. Luby,* in which the type of proceeding to which the United States has consented to be joined under 43 U.S.C. § 666 will be considered. It is appropriate that this Court prohibit the Water Court of Division No. 5 from attempting to exercise jurisdiction over the United States until the United States Supreme Court has considered the above question.

Wherefore, the petitioner, the United States of America, prays this Honorable Court:

(1) To take original jurisdiction in the matters thus presented to it.

(2) To issue an order commanding the respondent Court, Judge, and Water Referee to show cause why they, and each of them, should not be prohibited from asserting or attempting to assert jurisdiction over the United States in the pending water referee proceedings.

(3) To issue an order prohibiting the respondents, said Judge and Court and Referee from asserting or attempting to assert

jurisdiction over the United States in the pending water referee proceedings.

James L. Treece
JAMES L. TREECE,
United States Attorney,

Shiro Kashiwa
SHIRO KASHIWA,
Assistant Attorney General,

Edmund B. Clark
EDMUND B. CLARK,
Assistant Chief,
Appellate Section

Leonard Campbell
LEONARD W. D. CAMPBELL,
Assistant United States Attorney,

Robert H. Whaley
ROBERT H. WHALEY,
Attorney,
Department of Justice, Washington, D.C.

July 1970.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Application for Writ in the Nature of Prohibition have been served upon Kenneth Balcomb, Esquire, Delaney and Balcomb, Glenwood Springs, Colorado, Attorneys for The Colorado River Water Conservation District; Alvin L. Steinmark, Esquire, Miller, Steinmark, Ruyle and Shade, P.O. Box 749, Greeley, Colorado, Attorneys for Central Colorado Water Conservancy District; and John L. Kane, Jr., Esquire, Lakewood, Colorado, Attorney for Blue River Irrigation Company, by placing copies of same in the United States mail, postage prepaid, properly addressed, on this 1st day of July, 1970.

Robert H. Whaley
ROBERT H. WHALEY.

No. ——

In the Supreme Court of the State of Colorado

THE UNITED STATES OF AMERICA

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Receipt

The receipt of a copy of the Application for Writ in the Nature of Prohibition of the United States of America in the Supreme Court of the State of Colorado is hereby acknowledged by the undersigned Judge of the Water Court for Water Division No. 5, State of Colorado.

Signed this 1st day of July, 1970.

CLIFFORD H. DARROW,
Water Judge,
Water Division No. 5, State of Colorado.

[Received General Litigation Section; Apr. 27, 11:50 a.m., 1970, and and Natural Resources Division, Department of Justice]

In the District Court in and for Water Division No. 5, State of Colorado

Case No. Misc. No. 1

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS, CHANGES FOR WATER RIGHTS, ETC., FILED IN SAID COURT FOR THE MONTHS OF DECEMBER, 1969, AND JANUARY, 1970

Order

Appearances on the Motion to Quash:

Mr. James L. Treece, United States Attorney, Mr. Leonard W. D. Campbell, Assistant United States Attorney, Mr. David A. Osborne, Assistant United States Attorney, United States Courthouse, Denver, Colorado. Mr. Robert H. Whaley, Attorney, Department of Justice, Washington, D.C., Attorneys for Movant.

Messrs. Delaney and Balcomb, Mr. Kenneth Balcomb, Glenwood Springs, Colorado, Attorneys for The Colorado River Water Conservation District.

Messrs. Miller, Steinmark, Ruyle and Shade, Mr. Alvin L. Steinmark, P.O. Box 749, Greeley, Colorado, Attorneys for Central Colorado Water Conservancy District.

Mr. John L. Kane, Jr., Lakewood, Colorado, Attorney for Blue River Irrigation Company.

This matter came on for hearing and argument before the Court on the 9th day of April, 1970, upon the motion of the United States to quash service. Appearances were as noted on the title and venue page of this Order.

At the conclusion of the hearing, the matter was submitted for consideration and ruling by the Court.

The grounds of the Government's motion are two:

(1) The proceedings based on said applications do not constitute the kind of water rights adjudication suit with respect to which the United States has consented to be sued.

(2) The purported "service" of the résumé does not constitute "service of process" within the meaning and contemplation of 43 U.S.C. Sec. 666 [McCarran amendment].

I

The first ground of the motion has been ruled upon adversely to the Government by the Colorado Supreme Court in an original proceeding. See: The United States of America v. District Court of Eagle County (The Colorado River Water Conservation District, City and County of Denver, Central Colorado Water Conservancy District, and the New Jersey Zinc Company, Intervenors), —— Colo. —— (1969), 458 P. 2d 760.

Certiorari has been issued by the Supreme Court of the United States to the Colorado Supreme Court in that case for a review of its order discharging the rule to show cause why a writ of prohibition should not be issued to the trial court which had ruled that the United States was amenable to its jurisdiction in a supplemental general water adjudication being conducted under the Water Act which has since been superseded (except as to pending proceedings thereunder), by a new and different law known as the Water Rights Determination and Administration Act of 1969, under which these instant proceedings are pending.

The prohibition proceeding in the Colorado Supreme Court was heard and ruled upon under the earlier water law (C.R.S. 1963, 148–9–7).

In our opinion, the *ratio decidendi* of the Colorado Supreme Court is equally applicable to proceedings for which provision is made by the 1969 Act as concerns the Government's contention stated in sub-division (1) of the motion to quash. Perhaps to greater degree, because the jurisdiction of the Court for Water Division No. 5 extends to a much larger area than the former water district which is involved in the case on certiorari and which is now included within Water Division No. 5.

II

The second ground of the Government's motion states that the 1969 Act is inadequate in that service of the resume does not meet the requirements of "service" within the meaning of the McCarran amendment. 43 U.S.C. Section 666 provides in pertinent part:

> (b) Service of Summons. *Summons or other process* shall be served upon the Attorney General or his designated representative. [Emphasis supplied.]

Rule 4(d)(4) of the Federal Rules of Civil Procedure provides:

> (b) * * * When, under Rule 4(e) * * * service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule. * * *

A resume is a notice. Service of the resume is a procedural matter. Everyone (including the United States) receives the kind and length of notice to which he is entitled when served in conformity with state, and when applicable, federal statutes.

III

It might be said that there should be a present suspension of a ruling by this Court upon the motion to quash, inasmuch as the disposition of the original proceeding in the Colorado Supreme Court has been challenged in the highest Court in the land.

We are bound by and must follow, however, the rule of decision as enunciated by the highest Court of this state, while also being bound by the Supremacy Clause of the United States Constitution.[1] When we consider the waiver of immunity created in 43 U.S.C. 666, we do not find in the matter before this Court any conflict with the Supremacy Clause of the Constitution of the United States.

We shall treat the Colorado Water Rights and Determination Act of 1969, as a matter of local concern in which federal sovereign immunity has no place, unless and until the higher Courts of Colorado, or the federal jurisdiction, shall hold otherwise.

For the reasons stated, we must overrule the motion to quash.

It is so ordered.

The Court will entertain, where appropriate, applications by the United States for reasonable extensions of time.

Done at Chambers in the City of Glenwood Springs, Colorado, this 21st day of April, 1970.

CLIFFORD H. DARROW, *Water Judge,*
Water Division No. 5, State of Colorado.

Exceptions are preserved of record.

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[1] Article VI.

* * * * * * *

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

In the District Court in and for Water Division No. 5, State of Colorado

Case No. ——

IN THE MATTER OF THE APPLICATIONS FOR WATER RIGHTS FILED IN SAID COURT FOR THE MONTHS OF DECEMBER, 1969 AND JANUARY, 1970

Memorandum of Points and Authorities in Support of Motion To Quash Service

On February 4, 1970, the Attorney General received by mail a paper signed by the water clerk of Water Division No. 5 directed to "All Persons Interested In Water Applications Filed in Said Water Division No. 5." The paper first notified the reader that "The following is a resume of all applications filed in the Office of the Water Clerk during the month of December, 1969." There followed a list of water right applications giving brief descriptions of the water use, means of use, and applicant. The paper concluded with a statement that "You are further notified that you have until the last day of March, 1970, to file with the water clerk a verified statement of opposition to any such applications, if you desire to oppose any such applications." A similar paper listing the applications filed during the month of January was also received. On the face of it, it is apparent that such a paper does not constitute summons or other process within the meaning of 43 U.S.C. 666 nor does it describe proceedings with respect to which the United States has consented to be joined as a defendant.

I. THE UNITED STATES HAS NOT CONSENTED TO SUIT IN THIS TYPE OF PROCEEDING

The United States cannot be sued without its consent and Congress alone can give such consent. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Dalehite* v. *United States*, 346 U.S. 15, 30 (1933). Congress has given consent to join the United States as a defendant in certain suits involving the adjudication and administration of water rights. This consent is contained in 43 U.S.C. 666:

(a) *Joinder of United States as Defendant; Costs.* Consent is given to join the United States as a defend-

ant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) *Service of Summons.* Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

From the language of the statute and the cases construing the statute, it is apparent that the United States has not consented to suit in all matters involving water rights, but only in suits which meet certain conditions.

The federal courts which have construed the consent to suit provisions of 43 U.S.C. 666 have concluded that Congress intended to waive the sovereign immunity of the United States only in proceedings commonly known as "general adjudications." *Dugan* v. *Rank*, 372 U.S. 609 (1962); *State* v. *Rank*, 293 F. 2d 340 (C.A. 9, 1961); *Miller* v. *Jennings*, 243 F. 2d 157 (C.A. 5, 1957); *Nevada* v. *United States*, 279 F. 2d 699 (C.A. 9, 1960); see also *City of Chino* v. *Superior Court of Orange County*, 255 C.A. 2d 747, 63 Cal. Rptr. 532 (1967). The meaning of the term "general adjudication" as applied to 43 U.S.C. 666 can readily be determined by reference to the legislative history and the above cases construing 43 U.S.C. 666.

The Supreme Court in *Dugan* v. *Rank*, *supra*, interpreted the consent to suit provisions of 43 U.S.C. 666 to be limited to "general adjudications."

> It is sufficient to say that the provisions of the McCarran amendment, 66 Stat. 560, 43 U.S.C. § 666 [footnote omitted], relied upon by respondents and providing that the United States may be joined in suits "for the adjudication of rights to the use of water of a river system or other source," is not applicable here. Rather than a case involving a *general* adjudication of "all of the rights of various owners on a given stream," S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951), it is a private suit to determine water rights solely between the respondents and the United States and the local Reclamation Bureau officials. In addition to the fact that all of the claimants to water rights along the river are not made parties, no relief is either asked or granted as between claimants, nor are priorities sought to be established as to appropriative and proscriptive rights asserted." [372 U.S. at 618.]

In its opinion, the Supreme Court specifically stated that it agreed with the treatment of 43 U.S.C. 666 by the Ninth Circuit Court of Appeals in the case below, *State* v. *Rank*, *supra*, before it reached the Supreme Court. 372 U.S. at 617. In this regard, the Circuit Court stated:

> The question presented by the contention of the United States requires us to determine whether this suit can be regarded as one "for the adjudication of rights to the use of water of a river system" within the meaning of § 666.
>
> There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather it was the quasi public proceeding which in the law of western waters is known as a "general adjudication" of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated. [293 F. 2d 340, 346–7.]

Both the Supreme Court and the Court of Appeals referred to the Senate Report on the bill as further clarification of what type suit Congress had in mind when it passed 43 U.S.C. 666. Both courts concluded that the consent of the United States

to be joined in certain suits for the adjudication of water rights extended only to suits where "all the rights of various owners on a given stream", S. Rep. No. 755, 82 Cong., 1st Sess. 9 (1951), are involved in the suit. It is revealing of the intent of Congress to note that the Senate Report on the bill referred to the language of the Supreme Court in *Pacific Live Stock Co.* v. *Oregon Water Board* (*Lewis*), 241 U.S. 447 (1915), in reference to the type proceeding in which the Committee thought the United States should be joined.

> * * * All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first that the waters may be distributed, under public supervision, among the lawful claimants acccording to their respective rights without needless waste or controversy * * * [241 U.S. at 447–448; contained in S. Rep. 775, 82 Cong., 1st Sess. 9 (1951).]

In holding that 43 U.S.C. 666 did not consent to suit in a case alleged to be a general adjudication of water rights in the Santa Ana River system, the California Court of Appeals made reference to the precedure described in the *Pacific Live Stock Co.* case.

> It would be an idle act to question whether the Oregon statute under consideration in Pacific Live Stock Co. v. Lewis, 241 U.S. 440 [60 L.Ed. 1084, 36 S. Ct. 637], did indeed exemplify: "* * * the quasi-public proceeding which in the law of western waters is known as a 'general adjudication' of a stream system." It has been declared to be such, in the interpretation given by the courts of the United States to section 666 of title 43, U.S.C.A., by which we are bound. *City of Chino* v. *Superior Court of Orange County*, 255 C.A. 2d 747, 760 (1967).

The Fifth Circuit Court of Appeals in *Miller* v. *Jennings*, *supra*, found the consent to suit of the United States by 43 U.S.C. 666 restricted to suits where all the persons who have rights are before the court.

> The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. The Ninth Circuit Court of Appeals has most succinctly stated the doctrine in this manner: "The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time." *People of the State of California* v. *United States*, 9 Cir., 1956, 235 F. 2d 647, 663. See *Pacific Live Stock Co.* v. *Lewis*, 241 U.S. 440, 36 S. Ct. 637, 60 L. Ed. 1084. 243 F.2d at 159.

The essential elements of the proceedings to which the United States has consented to be joined as a defendant, as described by these cases as well as the legislative history of 43 U.S.C. 666, are that all the water users and all the water rights on a stream system be involved in the action before the court and all the rights of the parties be determined as between themselves. These elements constitute the essence of a "General Adjudication." The water referee proceeding does not constitute such a general adjudication of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The notice of the proceeding is directed only to those parties who may be "interested" in the water applications. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. The only parties before the referee are those who have taken affirmative action to file for a water right or have determined that they "desire" to file a Statement in Opposition, and even those who have elected to participate are not afforded an opportunity to present their case in a judicial manner. In addition, the provisions of the Colorado statute, which make all surface water rights confirmed under the current procedure junior to those awarded in previous district adjudications, necessarily exclude those previously decreed water rights from the

consideration of the referee. As a result, the only rights before the referee are those which have arisen since the last water proceeding. Hence, the proceeding is a very limited one, administrative in nature, involving only a fractional part of the water rights and parties in the entire water division. It is evident from the foregoing, that when the Attorney General received notice of the referee proceeding, the proceeding did not constitute a general adjudication where all water rights of all parties were to be determined as between themselves. Congress and the courts have determined that the United States has consented to no less.

While the terms used by the Colorado Legislature to describe proceedings created by the Water Right Determination and Administration Act of 1969, are not determinative of the substantive nature of the proceeding according to federal law, it is significant to note that the Colorado Legislature has designated the bi-annual water right tabulation proceeding as a "General Adjudication," Colo. Rev. Stat. 148–21–28(k), and has not so characterized the water referee proceeding.

II. THE UNITED STATES IS NOT A NECESSARY PARTY TO THE PROCEEDINGS BEFORE THE WATER REFEREE

Among other things, the consent to suit of the United States in 43 U.S.C. 666 is limited to suits in which the United States is a necessary party. The statutory provisions creating the referee proceeding do not make any party a necessary party, but on the contrary, involve only those parties who voluntarily elect to participate. The mailed notice is addressed not to necessary parties but to parties "interested" in the water applications. Response to the water applications is made only in the event that one "desires" to file a Statement in Opposition. Nowhere in the statute can it be found that the referee proceeding will be defective if any party fails to file a Statement in Opposition. Appearance before the referee by any party other than the party seeking a water right is not required by the statute and the activity by the referee would be complete even when no party has filed a Statement in Opposition or other Application for Water Right. Hence, there are no necessary parties under the referee procedure and complete relief can be granted to the applicant without the appearance of any other party.

This proceeding stands in marked contrast to that which existed under the previous adjudication procedure (repealed by the Water Right Determination and Administration Act of 1969) where the notice required by the statute specifically recited the command of the statute that "all owners or claimants of any water right in the water district * * * file a statement of claim * * * and * * * appear at said time and place for the taking of evidence in regard to all water rights so owned or claimed by them." Colo. Rev. Stat. 148–9–5–(1)(a). The referee procedure is unique in that it does not require that any party come in and file his claim for a water right but only provides for the filing of oppositions by interested parties. In such a case the United States is certainly not a necessary party. As noted before, Congress waived the immunity from suit of the United States only in situations where all claimants to water rights on the stream were necessary to obtain a complete degree.

III. THE RÉSUMÉ OF APPLICATIONS FOR WATER RIGHTS FILED DURING THE MONTHS OF DECEMBER AND JANUARY MAILED TO THE ATTORNEY GENERAL DO NOT CONSTITUTE SERVICE OF "SUMMONS OR OTHER PROCESS" UNDER 43 U.S.C. 666

Because the water referee proceeding is not a suit for the adjudication of water rights within the meaning of 43 U.S.C. 666, the paper received by the Attorney General cannot constitute "summons or other process" under 43 U.S.C. 666.

Moreover, the language of 43 U.S.C. 666 requires that in order for the United States to be joined as a defendant in a suit of the type to which it has consented, it must be served with a summons or process which effects such joinder. However, the proceedings before the water referee under the Colorado Water Right Determination and Administration Act of 1969, do not contemplate the joinder of any party as a defendant and do not require personal service of process for jurisdiction. In fact no provision for personal service of process is contained in the statute and the statute states that the jurisdiction of the Water Court and referee over water matters is not contingent on personal service of process, Colo. Rev. Stat. § 148–21–20(3). Hence, receipt by the Attorney General of a résumé of water right applications filed, which apparently would not constitute "service of process" for jurisdictional purposes on

citizens of Colorado, cannot be so construed in regard to the United States.

Since the Colorado Legislature did not contemplate service of notice as a prerequisite to proceedings under the statute on the applications filed, it seems plain that such proceedings do not constitute the kind of proceedings contemplated by Section 666, with respect to which Congress considered service of process essential to the jurisdiction of the Court.

Respectfully submitted,

JAMES L. TREECE,
United States Attorney,

LEONARD W. D. CAMPBELL,
Assistant United States Attorney,
Robert H. Whaley,

ROBERT H. WHALEY,
Attorney,
Department of Justice,
Attorneys for defendant.

In the District Court In and For Water Division No. 5, State of Colorado

To: All Persons Interested in Water Applications in Said Water Division No. 5

Pursuant to C.R.S. 148–21–18, you are notified that the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969.

The names and addresses of applicants, description of water rights or conditional water right involved, and description of ruling sought, are as follows:

1. Application No. W–1, is an application for water rights of Nettie O. Dodge, Granby, Colorado, in the Dodge Spring and Pipeline No. 2. The point of diversion is a spring box located at a point whence the E¼ corner of Section 35, Township 2 North, Range 77 West of the 6th P.M. bears N.29°16′E. a distance of 2,935.5 feet, taking water from a spring or seepage tributary to the Fraser River. Date of initiation of the appropriation: August 25, 1925. Use or proposed use of the water: domestic, irrigation and stock-watering. Amount of water claimed is .02 of a cubic foot per second.

2. Application No. W–2, is an application for water rights of Nettie O. Dodge, Granby, Colorado, in the Dodge Spring and Pipeline No. 1. The point of diversion is a spring box located at a point whence the E¼ corner of Section 35, Township 2 North, Range 77 West of the 6th P.M. bears N.53°07′E. a distance of 3,213 feet, taking water from a spring or seepage tributary to the Fraser River. Date of initiation of the appropriation: August 25, 1925. Use or proposed use of the water: Domestic, irrigation and stock-watering. Amount of water claimed is .02 of a cubic foot per second.

3. Application No. W–3, is an application for water rights of Robert D. Henry, Grand Lake, Colorado, in the Henry Ditch. The point of diversion is a headgate located at a point on the right bank of an unnamed creek, a tributrary of the North Fork of the Colorado River, whence the W¼ corner of Section 24, Township 4 North, Range 76 West of the 6th P.M., Grand County, Colorado bears N.49°55′W. for 743.21 feet. Use or proposed use of the water: irrigation purposes. Date of initiation of the appropriation: July 10, 1966. Amount of water claimed by diversion in cubic feet per second of time: 5.0.

4. Application No. W–4, is an application for water storage rights of Robert L. Busse and Elaine A. Busse in Grand Lake, Colorado, in the Busse Fish Pond No. 2. Amount of water claimed in acre feet: 9.86. Reservoir survey at high water line: beginning at a point whence the S¼ corner of Section 35, Township 4 North, Range 76 West of the 6th P.M. bears S. 58°-43′W. a distance of 654.69 feet; thence N.29°30′W. a distance of 183.00 feet; thence N.15°41′W. a distance of 242.00 feet; thence N.06°30′W. a distance of 75.00 feet; thence N.01°00′ W. a distance of 107.00 feet; thence N.70°00′E. a distance of 20.00 feet; thence S.21°00′E. a distance of 100.00 feet; thence S.04°-45′E. a distance of 73.00 feet; thence S.18°00′E. a distance of 150.00 feet; thence S.38°45′E. a distance of 98.00 feet; thence S.20°30′E. a distance of 180.00 feet, thence S.68°50′E. a distance of 74.26 feet to the point of beginning. Source of water: Busse Pickup Lateral No. 2, a tributary of the North Fork of the Colorado River. Proposed use of the water: fish culture purposes. Date of initiation of the appropriation: June 22, 1968. Date of approval of the reservoir by State Engineer: June 22, 1968. State Engineer No.: 23463.

5. Application No. W–5, is an application for water rights of Robert L. Busse and Elaine A. Busse in Grand Lake, Colo-

rado, in the Busse Pickup Lateral No. 2. The point of diversion is a headgate located at a point whence the NE corner of Section 35, Township 4 North, Range 76 West of the 6th P.M. bears N.33°00′E. a distance of 154.00 feet, taking water from an unnamed creek arising in Section 26, Township 4 North, Range 76 West, a tributary to the North Fork of the Colorado River. Date of initiation of the appropriation: June 30, 1968. Use or proposed use of the water: Irrigation and stock-watering. Amount of water claimed by diversion in cubic feet per second of time: 20.00.

6. Application No. W–6, is an application for water rights of Robert L. Busse and Elaine A. Busse in Grand Lake, Colorado, in the Busse Pickup Lateral No. 1, taking water from an unnamed creek arising in Section 26, Township 4 North, Range 76 West of the 6th P.M. which is tributary to the North Fork of the Colorado River, and the DeWitt Ditch. Date of initiation of the appropriation: July 1, 1963. Use or proposed use of the water: irrigation and stock-watering. Amount of water claimed by diversion in cubic feet per second of time: 20.00. The point of diversion or proposed diversion is a headgate located at a point whence the W.¼ corner of Section 25, Township 4 North, Range 76 West of the 6th P.M. bears West a distance of 645.00 feet.

7. Application No. W–7, is an application for water storage rights of Robert L. Busse and Elaine A. Busse in Grand Lake, Colorado, in Busse Fish Pond No. 1, taking water from seepage from North Fork of the Colorado River (off channel excavation). Legal description of reservoir survey at high water line: Beginning at a point whence the S.¼ corner of Section 35, Township 4 North, Range 76 West of the 6th P.M. bears S.65°02′W. for 796.96 feet; thence S.71°33′E. a distance of 100.00 feet; thence S.45°20′E. a distance of 96.00 feet; thence S.53°36′E. a distance of 174.00 feet; thence S.41°37′E. a distance of 123.00 feet; thence S.02°47′W. a distance of 84.13 feet; thence N.75°46′W. a distance of 147.00 feet; thence S.53°22′W. a distance of 182.00 feet; thence N.40°13′W. a distance of 100.00 feet; thence N.03°10′W. a distance of 348.00 feet to the point of beginning. Date of initiation of the appropriation: June 22, 1968. Date of approval of reservoir by State Engineer: February 13, 1969. State Engineer No.: 23463. Amount of water claimed in acre feet: 21.40. Proposed use of the water: fish culture purposes.

8. Application No. W–8, is an application for water rights of C Lazy U Ranch, Inc., in Granby, Colorado, in C Lazy U Spring No. 1, taking water from a spring or seepage tributary to the Colorado River. The point of diversion is a spring box located at a point whence the East ¼ corner of Section 15, Township 2 North, Range 77 West of the 6th P.M., Grand County, Colorado bears S.45°56′E. a distance of 2067.0 feet. Use or proposed use of the water: irrigation and stock-watering. Amount of water claimed by diversion in cubic feet per second of time: .02. Date of initiation of appropriation: July, 1925.

9. Application No. W–9, is an application for water rights of C Lazy U Ranch, Inc., Granby, Colorado, in the C Lazy U Spring No. 2. The point of diversion is a spring box located at a point whence the SW corner of Section 11, Township 2 North, Range 77 West of the 6th P.M., Grand County, Colorado, bears S.75°27′W. a distance of 887.0 feet, taking water from a spring or seepage tributary to the Colorado River. Amount of water claimed is .02 of a cubic foot per second. Use or proposed use of the water: Irrigation and stock-watering. Date of initiation of the appropriation: July, 1925.

10. Application No. W–10, is an application for water rights of C Lazy U Ranch, Inc., Granby, Colorado, in the C Lazy U Spring No. 3 and Pipeline, taking water from a spring or seepage tributary to Willow Creek, a tributary of the Colorado River. Use or proposed use of the water: domestic, irrigation and stock-watering. Amount of water claimed is .03 of a cubic foot per second. Date of initiation of the appropriation: July, 1920. The point of diversion is a spring box and pipeline intake at a point whence the N¼ corner of Section 11, Township 2 North, Range 77 West of the 6th P.M., Grand County, Colorado, bears N.37°23′E. a distance of 550.8 feet.

11. Application No. W–11, is an application for water storage rights of C Lazy U Ranch, Inc., Granby, Colorado, in the C Lazy U Fish Pond No. 2. The legal description of reservoir survey at high water line: beginning at a point whence the NE corner of Section 3, Township 2 North, Range 77 West of the 6th P.M. bears N.20°14′E. a distance of 2227.0 feet; thence N.87°20′W. a distance of 43.0 feet; thence N.52°55′W. a distance of 30.0 feet; thence S.88°05′W. a distance of 73.0 feet; thence N.82°25′W. a distance of 96.0 feet; thence S.60°45′W. a distance of 129.0 feet; thence S.48°25′W. a distance of 51.0 feet; thence S.46°05′E. a distance of 55.0 feet; thence S.42°50′E. a distance of 75.0 feet; thence S.40°10′E. a distance of 107.0 feet; thence

S.84°15′E. a distance of 85.0 feet; thence S.80°20′E. a distance of 47.0 feet; thence N.87°50′E. a distance of 78.0 feet; thence N.04°06′E. a distance of 256 feet to the place of beginning. Source of water: Spring run-off from adjacent lands and springs and seepages developed under said pond. Date of initiation of appropriation: August 1, 1956. Date of approval of reservoir by State Engineer: December 26, 1968. State Engineer No.: 23442. Amount of water claimed is 15.77 acre feet. Use of the water: Irrigation, recreation, fish culture, stock-watering and domestic uses.

12. Application No. W–12, is an application for change of water right of Straight Creek Corporation, Littleton, Colorado, in the Rankin No. 1 Ditch and the Rankin No. 2 Ditch, in Summit County. Present point of diversion: On the north side or right bank of Straight Creek, from which it derives its supply of water, whence the West ¼ corner of Section 5, Township 5 South, Range 77 West of the 6th P.M. bears North 84°36′ West 4759 feet. Amount and priority of diversion: Rankin No. 1 Ditch: 5.0 c.f.s. decreed to Priority No. 16, Water District No. 36; Rankin No. 2 Ditch: 1.25 c.f.s. decreed to Priority No. 20, Water District No. 36. The proposed change is from irrigation to irrigation, domestic, municipal and recreation purposes. Date of appropriation: Rankin No. 1 Ditch: May 18, 1883; Rankin No. 2 Ditch: June 1, 1883. Date of decree: March 2, 1910.

13. Application No. W–13, is an application for water right of Straight Creek Corporation, Littleton, Colorado, in the Rankin No. 3 Ditch in Summit County. The point of diversion is on the North side or right bank of Straight Creek, from which it derives its supply of water, whence the West quarter corner of Section 5, Township 5 South, Range 77 West of the 6th P.M., bears North 84°36′ West 4759 feet. Date of initiation of the appropriation: May 18, 1883. Amount of water claimed is 6.25 cubic feet per second. Use or proposed use of the water: Irrigation, municipal, domestic and recreation purposes.

14. Application No. W–15, is an application for water rights of The Superior Oil Company in Rio Blanco County, Colorado, in The Superior Oil Company Diversion and Storage Project. The address of the applicant is P.O. Box 1521, Houston, Texas.

A. THE SUPERIOR OIL COMPANY STORAGE SYSTEM:

1. The Superior Oil Company Storage System consists of four reservoirs and their respective filler pipelines:

a. Crooked Wash Reservoir: The left abutment is located at a point whence the SE corner of Section 35, Township 3 North, Range 98 West of the 6th P.M. bears S.61°-48′E., 2406 feet, taking water from the White River by pumping pipeline and Crooked Wash. Amount of water claimed is 11,800 acre feet, for which ruling is sought.

b. Wray Gulch Reservoir: The right abutment is located at a point whence corner No. 1 of Tract 48, Section 35, Township 2 North, Range 97 West of the 6th P.M. bears S.07°52′W., 718 feet, taking water from the White River by pumping pipeline and Wray Gulch. Amount of water claimed is 13,500 acre feet, for which ruling is sought.

c. Blacks Gulch Reservoir: The left abutment is located at a point whence the ¼ corner common to Section 32, Township 2 North, and to Section 5, Township 1 North, Range 96 West of the 6th P.M. bears S.68°11′W., 505 feet, taking water from the White River by pumping pipeline and Blacks Gulch. Amount of water claimed is 13,900 acre feet, for which ruling is sought.

d. Kellog Gulch Reservoir: The right abutment is located at a point whence corner No. 4 of Tract 45, Section 9, Township 1 North, Range 96 West of the 6th P.M. bears S.21°54′E., 717 feet, taking water from the White River by pumping pipeline and Kellog Gulch. Amount of water claimed is 3,700 acre feet, for which ruling is sought.

e. Crooked Wash Pipeline: The headgate is located at a point on the right bank of the White River, from which it derives its supply of water, whence the SE corner of Section 35, Township 3 North, Range 98 West of the 6th P.M. bears S.88°45′E., 3135 feet. Amount of water claimed by diversion is 100 c.f.s., for which ruling is sought.

f. Wray Gulch Pipeline: The headgate is located at a point on the right bank of the White River, from which it derives its supply of water, whence corner No. 1 of Tract 48, Section 35, Township 2 North, Range 97 West of the 6th P.M. bears N.53°45′W., 550 feet. Amount of water claimed by diversion is 100 c.f.s., for which ruling is sought.

g. Blacks Gulch Pipeline: The headgate is located at a point on the right bank of the White River, from which it derives its supply of water, whence the north ¼ corner of Section 5, Township 1 North, Range 96 West of the 6th P.M. bears N.15°45′E., 5120 feet. Amount of water claimed by diversion is 100 c.f.s., for which ruling is sought.

h. Kellog Gulch Pipeline: The headgate is located at a point on the right bank of the White River, from which it derives its supply of water, whence corner No. 4 of Tract 45, Section 9, Township 1 North, Range 96 West of the 6th P.M. bears No. 90°E., 1,075 feet. Amount of water claimed by diversion is 100 c.f.s., for which ruling is sought.

B. THE SUPERIOR OIL COMPANY PIPELINE & TERMINAL RESERVOIRS:

1. The Superior Oil Company Pipeline and Terminal Reservoirs headgate is located at a point on the left bank of the White River, from which it derives its supply of water, whence corner Number 3, Tract 40, Township 1 North, Range 97 West of the 6th P.M. bears S.51°52′52″E., 2,730.66 feet. Amount of water claimed by diversion is 12 c.f.s., for which ruling is sought. Two terminal, operational storage reservoirs are contemplated, with an aggregate capacity of 800 acre feet, for which ruling is sought. Date of initiation of the appropriation: Work was commenced by survey on the 14th day of May, 1968.

2. Proposed use of the water from The Superior Oil Company Diversion and Storage Project is for industrial, mining, power, irrigation, domestic, municipal, recreational, and other beneficial purposes.

15. Application No. W–16, is an application for water rights of The Superior Oil Company, P.O. Box 1521, Houston, Texas, in The Superior Oil Company Pumpback Pipelines No. 1 & No. 2, in Rio Blanco County. The headgate of Pumpback Pipeline No. 1 is located at a point whence the SW corner of Section 23, Township 2 N., Range 101 W. of the 6th P.M. bears N.43°-34′45″W., 1,516.64 feet; the headgate of Pumpback Pipeline No. 2 is located at a point whence the NE corner of Section 9, Township 1 N., Range 102 W. of the 6th P.M. bears N.87°04′-43″E., 1,981.95 feet. Source of water is the White River. Date of initiation of the appropriation: Work was commenced by survey on the 5th day of October, 1968. Amount of water claimed by diversion: Pumpback Pipeline No. 1: 12 c.f.s.; Pumpback Pipeline No. 2: 12 c.f.s. Use or proposed use of the water: Industrial, mining, power, irrigation, domestic, municipal, recreational, and other beneficial purposes.

16. Application No. W–17, is an application for water rights of The Superior Oil Company, P.O. Box 1521, Houston, Texas, in The Superior Oil Company Pumpback Pipeline No. 3, in

Rio Blanco County, taking water from the White River. The point of proposed diversion is a headgate located at a point whence the SW corner of Section 23, Township 2 N., Range 101W. of the 6th P.M. bears S.01°55'27"W. 2462.19 feet. Date of initiation of the appropriation: Work was commenced by survey on the 5th day of October, 1968. Amount of water claimed is 12 cubic feet per second. Use or proposed use of water: Industrial, mining, power, irrigation, domestic, municipal, recreation, and other beneficial purposes.

17. Application No. W–14. Name and address of applicants: Sohio Petroleum Company, The Oil Shale Corporation, and The Cleveland-Cliffs Iron Company, c/o Colony Development Operation, Atlantic Richfield Company, 1500 Security Life Bldg., 1616 Glenarm Place, Denver, Colo. 80202; Reese R. Inskeep and Roy H. Inskeep, DeBeque, Colo.

DESCRIPTION OF WATER RIGHT

The Larkin Ditch, to which the following decrees were heretofore entered:

A decree in an adjudication in Water District 42, on July 22, 1912, for 25 cubic feet per second for irrigation, with priority date of April 1, 1888, and a decree entered July 25, 1941, for 10.4 cubic feet, for domestic use during non-irrigation season, priority date of April 1, 1888.

RULING SOUGHT

Present point of diversion is on south bank of Colorado River, the source of supply, whence the SE corner of SW¼, Sec. 27, Twp. 8 S., R. 97 W. of the 6th P.M., Mesa County, Colorado, bears south 2°45'W. 2,830 feet.

The applicants seek an alternate point of diversion for the use of the water represented by stockholdings of the applicants in The Larkin Irrigation Company: 35 shares owned by the applicants (of the 90 shares of the capital stock of The Larkin Irrigation Company) and 5 shares (of the 90 shares) held under option by Sohio Petroleum Company. The alternate point of diversion will be at the intake of the Deer Park Gulch Pumping Pipeline, being at a pumping plant on the right bank of the Colorado River whence the Northwest corner of Sec. 21, Twp. 8 S., R. 97 W. of the 6th P.M. bears North 43°08' west a distance of

10,290 feet. The applicants seek to retain the Larkin Ditch as an additional point to divert water represented by their stock. Applicants also seek permission for a change of use of the water which will be diverted at the alternate point of diversion. The new uses will be industrial, mining, domestic, municipal, irrigation, recreational and other beneficial uses. In addition, applicants seek a change in place of use of the water to be diverted at the alternate point of diversion, such new places being at or near oil shale properties held by Sohio, Oil Shale Corp. and Cleveland-Cliffs in Twps. 5, 6 and 7 S., Ranges 95, 96, and 97 W. of the 6th P.M., Garfield County, Colorado. When the applicants are using the alternate point of diversion, they seek to divert water year around under the irrigation right, subject to any conditions which might be imposed to protect the rights of others, and only during the non-irrigation season under the domestic right. The changes sought in the application are only for interests in said water rights which are represented by the stock owned by or under option to applicants Sohio Petroleum Company, The Oil Shale Corporation and The Cleveland-Cliffs Iron Company.

You are further notified that you have until the last day of March, 1970, to file with the water clerk a verified statement of opposition to any such applications, if you desire to oppose any such applications.

By order of the Court entered January 15, 1970.

KAY PHILLIPS,
Water Clerk for Water Division No. 5,
Third Floor, Garfield County Courthouse,
Glenwood Springs, Colorado.

Published between February 4 and 6th.

Clerk's Office, Supreme Court, State of Colorado, Denver 80203

Case No. 24821

UNITED STATES OF AMERICA

v.

DISTRICT COURT, ETC. ET AL.

July 9, 1970.

Copy of an order entered in the above numbered and titled case July 9, 1970, is enclosed.

Yours very truly,

RICHARD D. TURELLI,
Clerk.

By MARY F. SPARK,
Deputy.

cc:

Mr. James L. Treece, United States Attorney, U.S. Court House, Denver, Colorado.
Mr. Shiro Kashiwa, Assistant Attorney General, U.S. Court House, Denver, Colorado.
Mr. Edmund B. Clark, Assistant Chief, Appellate Section, U.S. Court House, Denver, Colorado.
Mr. Leonard W. D. Campbell, Assistant United States Attorney, U.S. Court House, Denver, Colorado.
Mr. Robert H. Whaley, Attorney, Dept. of Justice, Washington, D.C.
Mr. Kenneth Balcomb, 829 Grand Ave., Glenwood Springs, Colo.
Mr. Alvin L. Steinmark, P.O. Box 749, Greeley, Colo.
Mr. John L. Kane, Jr., 1401 Saulsbury, Lakewood, Colo. 80215.

In the Supreme Court of the State of Colorado

THE UNITED STATES OF AMERICA, 24821

vs.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Application for Writ in the Nature of Prohibition, Thursday, July 9, 1970

ORIGINAL PROCEEDING

Upon consideration of the application of the United States of America for writ in the nature of prohibition, together with the pleadings filed, it is this day ordered that said application be, and hereby is, denied.

By the Court, en banc, July 9, 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION No. 5, STATE OF COLORADO, ET AL.

Order Allowing Certiorari. Filed December 7, 1970

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted and the case is set for oral argument immediately following No. 87.

U.S. GOVERNMENT PRINTING OFFICE: 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

The Solicitor General, on behalf of the United States, petitions that a writ of certiorari be granted to review the judgment of the Supreme Court of the State of Colorado entered in this case on July 9, 1970.

OPINION BELOW

The Colorado Supreme Court did not render any opinion. The opinion and order of the Water Court (App. B, *infra*, pp. 10-13) are not reported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on July 9, 1970 (App. C, *infra*, p. 14).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether in 43 U.S.C. 666 Congress consented to suits against the United States in state courts for adjudication of its reserved water rights not predicated on state law.

2. Whether the congressional consent to suit in 43 U.S.C. 666 extends to monthly proceedings affecting federal water rights in which a water referee determines, without a formal hearing, water rights of those parties who have voluntarily filed water right applications during the proceeding month.

STATUTE INVOLVED

The Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides in pertinent part:

> Suits for adjudication of water rights.
>
> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are

inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

On February 11, 1970, the Attorney General received a notice, pursuant to the Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. Stat., 148-21-1 *et seq.*, directed to "all persons interested in water applications in said water division No. 5," that "the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969" (App. A, *infra*, p. 9). There followed a list of water right applications giving brief descriptions of the water use. The notice concluded with the statement that "[y]ou are further notified that you have until the last day of March, 1970, to file a verified statement of opposition to any such application, if you desire to oppose any such applications." Similar notices have been received listing water right applications filed during each month thereafter. In addition, the Attorney General received similar resumes of applications filed in Water Divisions 4 and 6 during the month of December 1969.

In response to the December 1969 notice, the United States filed with the Water Court of Water Division 5 a motion to quash service on the grounds, *inter alia*,

that the proceedings before the water court did not constitute the type of water rights adjudication with respect to which the United States had consented to be sued under 43 U.S. 666. The water court denied the government's motion (App. B, *infra*, pp. 10-13). It recognized that the consent issue is presently before this Court in *United States* v. *The District Court in and for the County of Eagle and the State of Colorado*, No. 87, this Term, certiorari granted, 397 U.S. 1005, a case arising from an earlier Colorado water rights proceeding involving a portion of the same water rights here involved. The court was of the view that it was bound by the decision of the Colorado Supreme Court in *Eagle County* unless and until that decision was overturned by this Court (App. B, *infra*, pp. 12-13). Subsequently, the government's request to extend the time within which to file an answer pending the resolution of *Eagle County* was also denied. Finally, the government applied to the Colorado Supreme Court for a writ of prohibition to stay the proceedings, which the latter court denied on July 9, 1970 (App. C, *infra*, p. 14).

In *Eagle County*, the United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37, one of the then 70 water districts in Colorado. Subsequent to the Colorado district court's denial of the government's motion to dismiss that action for lack of jurisdiction, the Colorado Water Right Determination and Administration Act of 1969 was passed, abolishing[1] the 70 water districts and replacing them with seven water

[1] But see Section 148-21-44 of the 1969 Act as to pending matters.

divisions. Water Division No. 5 includes the area drained by the Colorado River and its tributaries (excluding the Gunnison River), which also includes the former Water District 37 involved in the *Eagle County* case.

The water rights of the United States within the expanded area, however, are vastly more numerous than those involved in the *Eagle County* case. The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior, through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife, make use of water in Water Division No. 5 for national recreational and other purposes. The Department of the Navy administers certain Naval Petroleum and Oil Reserves which, if ever developed, would require water to accomplish the federal purpose for which the reservation was made.

As in the former Water District 37, the United States claims two types of rights in the larger Water Division No. 5: *appropriative* rights acquired pursuant to state law, and *reserved* and other rights based on federal law, resulting principally from withdrawals of land from the public domain.

REASONS FOR GRANTING THE WRIT

This case raises in a somewhat different factual context the same issues involved in *Eagle County*, No. 87, this Term. The statutory water adjudica-

tion procedures underlying the decision below, however, are the ones now prevailing in Colorado and will govern future state proceedings affecting the vast water interests of the United States in that state. Because the new procedures are significantly different from the repealed procedures from which *Eagle County* arose, this case complements *Eagle County* in an important way and should also be reviewed by this Court.

Two issues are presented in *Eagle County*. The first is whether the consent to be sued embodied in 43 U.S.C. 666 extends to suits against the United States for adjudication of its reserved water rights not predicated on state law; the second is whether a supplemental water adjudication proceeding under the old state law is the type of general water rights adjudication suit contemplated by the consent statute. The first issue is as squarely presented in this case as in *Eagle County* and needs no elaboration here. See our brief in *Eagle County*, pp. 10-19.

The second issue in *Eagle County* is here presented in the context of the new state procedures. While some of the defects of the old law have been eliminated (*e.g.*, each of the 70 districts under the old law encompassed only a small segment of a river system), the new procedures are, if anything, more burdensome on the government and bear no similarity to a general adjudication which, in one suit, establishes the rights of all parties *inter sese*. *Dugan* v. *Rank*, 372 U.S. 609; *State* v. *Rank*, 293 F.2d 340 (C.A. 9); *Miller* v. *Jennings*, 243 F.2d 157 (C.A. 5).

See legislative history set forth in our *Eagle County* brief at pp. 12-15.

The new statute contemplates monthly proceedings before a water referee on water right applications. These proceedings do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The notice of the proceeding is directed only to those parties who may be "interested" in the water applications. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. The only parties before the referee are those who have taken affirmative action to file for a water right or have determined that they "desire" to file a statement in opposition, and even those who have elected to participate are not accorded a hearing on the numerous factual issues these cases necessarily involve. In addition, the Colorado statute, which makes all surface water rights confirmed under the current procedure junior to those awarded in previous district adjudications, necessarily excludes those previously decreed water rights from the consideration of the referee. As a result, the only rights before the referee are those which have arisen since the last water proceeding.

The referee's proceeding is thus extremely limited. It is administrative rather than judicial, and involves only a small part of the water rights and parties in the entire water division. Such a proceeding does not constitute a "general adjudication" as intended by Congress in 43 U.S.C. 666. See *Dugan* v. *Rank*,

supra, and *Miller* v. *Jennings*, *supra*. And see the discussion in our *Eagle County* brief, pp. 24-30.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

WALTER KIECHEL, JR.,
Deputy Assistant Attorney General.

EDMUND B. CLARK,
ROBERT H. WHALEY,
Attorneys.

OCTOBER 1970.

APPENDIX A

IN THE DISTRICT COURT IN AND FOR
WATER DIVISION NO. 5
STATE OF COLORADO

To: ALL PERSONS INTERESTED IN WATER APPLICATIONS IN SAID WATER DIVISION NO. 5

Pursuant to C.R.S. 148-21-18, you are notified that the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969.

The names and addresses of applicants, description of water right or conditional water right involved, and description of ruling sought, are as follows:

* * * *

APPENDIX B

IN THE DISTRICT COURT IN AND FOR
WATER DIVISION NO. 5
STATE OF COLORADO

Case No. Misc. # 1

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS, CHANGES FOR WATER RIGHTS, ETC., FILED IN SAID COURT FOR THE MONTHS OF DECEMBER, 1969, AND JANUARY, 1970

ORDER

* * * *

This matter came on for hearing and argument before the Court on the 9th day of April, 1970, upon the motion of the United States to quash service. Appearances were as noted on the title and venue page of this Order.

At the conclusion of the hearing, the matter was submitted for consideration and ruling by the Court.

The grounds of the Government's motion are two:

(1) The proceedings based on said applications do not constitute the kind of water rights adjudication suit with respect to which the United States has consented to be sued.

(2) The purported "service" of the resume does not constitute "service of process" within the meaning and contemplation of 43 U.S.C. Sec. 666 [McCarran amendment].

I

The first ground of the motion has been ruled upon adversely to the Government by the Colorado Supreme Court in an original proceeding. See: The

United States of America v. District Court of Eagle County (The Colorado River Water Conservation District, City and County of Denver, Central Colorado Water Conservancy District, and the New Jersey Zinc Company, Intervenors), —— Colo. —— (1969), 458 P. 2d 760.

Certiorari has been issued by the Supreme Court of the United States to the Colorado Supreme Court in that case for a review of its order discharging the rule to show cause why a writ of prohibition should not be issued to the trial court which had ruled that the United States was amenable to its jurisdiction in a supplemental general water adjudication being conducted under the Water Act which has since been superseded (except as to pending proceedings thereunder), by a new and different law known as the Water Rights Determination and Administration Act of 1969, under which these instant proceedings are pending.

The prohibition proceeding in the Colorado Supreme Court was heard and ruled upon under the earlier water law (C.R.S. 1963, 148-9-7).

In our opinion, the *ratio decidendi* of the Colorado Supreme Court is equally applicable to proceedings for which provision is made by the 1969 Act as concerns the Government's contention stated in sub-division (1) of the motion to quash. Perhaps to greater degree, because the jurisdiction of the Court for Water Division No. 5 extends to a much larger area than the former water district which is involved in the case on certiorari and which is now included within Water Division No. 5.

II

The second ground of the Government's motion states that the 1969 Act is inadequate in that service of the resume does not meet the requirements of

"service" within the meaning of the McCarran amendment. 43 U.S.C. Section 666 provides in pertinent part:

> (b) Service of Summons. *Summons or other process* shall be served upon the Attorney General or his designated representative (Emphasis supplied).

Rule 4(d)(4) of Federal Rules of Civil Procedure provides:

> (b) . . . When, under Rule 4(e) . . . service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule. . . .

A resume is a notice. Service of the resume is a procedural matter. Everyone (including the United States) receives the kind and length of notice to which he is entitled when served in conformity with state, and when applicable, federal statutes.

III

It might be said that there should be a present suspension of a ruling by this Court upon the motion to quash, inasmuch as the disposition of the original proceeding in the Colorado Supreme Court has been challenged in the highest Court in the land.

We are bound by and must follow, however, the rule of decision as enunciated by the highest Court of this state, while also being bound by the Supremacy Clause of the United States Constitution.[1] When we

---

[1] Article VI.

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made,

consider the waiver of immunity created in 43 U.S.C. 666, we do not find in the matter before this Court any conflict with the Supremacy Clause of the Constitution of the United States.

We shall treat the Colorado Water Rights and Determination Act of 1969, as a matter of local concern in which federal sovereign immunity has no place, unless and until the higher Courts of Colorado, or the federal jurisdiction, shall hold otherwise.

For the reasons stated, we must overrule the motion to quash.

It is so ordered.

The Court will entertain, where appropriate, applications by the United States for reasonable extensions of time.

Done at Chambers in the City of Glenwood Springs, Colorado, this 21st day of April, 1970.

CLIFFORD H. DARROW
Water Judge,
Water Division No. 5,
State of Colorado.

Exceptions are preserved of record.

---

or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF COLORADO

24821

THE UNITED STATES OF AMERICA

vs.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Application for Writ in the Nature of Prohibition

ORIGINAL PROCEEDING

Upon consideration of the application of the United States of America for writ in the nature of prohibition, together with the pleadings filed, it is this day ordered that said application be, and hereby is, denied.

BY THE COURT, EN BANC, July 9, 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 403709 223

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INDEX

Page

Statute Involved 2

Questions Presented 3

Statement 3

Argument 7

Conclusion 13

CITATIONS

CASES:

United States v. The District Court in and for the County of Eagle and the State of Colorado, No. 87, this Term, certiorari granted, 397 U.S. 1005 *in passim*

West End Irr. Co. v. Garvey, 117 Colo. 109, 184 P.2d 476 (1947) 9

STATUTES:

Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666 (McCarran Amendment) ..... *in passim*

Colo. Rev. Stat. (1963), *as amended* (1969) ..... *in passim*

148-21-1 3

148-21-3(2) 4

148-21-8(6) 4

148-21-18(3) 5

150-7-1 4

Fed. R. Civ. P. 4(d)(4) 4

MISCELLANEOUS:

Comment, Adjudication of Federal Reserved Water Rights, 42 U. Colo. L. Rev. 161, 166 (1970) 8

Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951) 12

S. 18, 82d Cong., 1st Sess. (1951) 8, 12

S. Rep. No. 755, 82d Cong., 1st Sess. (1951) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES OF AMERICA, *Petitioner*

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

MEMORANDUM OF RESPONDENT COURT AND THE COLORADO RIVER WATER CONSERVATION DISTRICT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

In responding to the petition for a writ of certiorari in *United States* v. *The District Court in and for the County of Eagle and the State of Colorado*, No. 87, this Term, certiorari granted, 397 U.S. 1005, the respondent court and the Colorado River Water Conservation District urged this Court to grant the writ because ". . . of the importance of determining now the

issue of state court jurisdiction under 43 U.S.C. § 666". (Brief on certiorari at 1). Since that same issue is at the heart of the pending petition in No. 812, we support the granting of the writ here. However, just as we differed with the view of the Government in No. 87 that the court below erred, we differ here for additional reasons, among which are the Government's assumptions as to Colorado's 1969 water law, which we set forth briefly herein for the consideration of the Court in its action on the petition.

STATUTE INVOLVED

The Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666 provides as follows:

> Suits for adjudication of water rights
>
> (a) *Joinder of United States as defendant; costs.*
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

(b) *Service of summons.*

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) *Joinder in suits involving use of interstate streams by State.*

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

QUESTIONS PRESENTED[1]

(1) Whether under 43 U.S.C. 666, a State court in adjudicating water rights under State law can obtain jurisdiction over the United States.

(2) Whether, upon joinder of the United States pursuant to 43 U.S.C. 666, the United States must present all of the water rights it owns or claims, including those it may claim as reserved rights, for adjudication with the claims of others.

STATEMENT

Interest of these respondents. The judge and the referee of the respondent District Court for Water Division 5 in Colorado are charged under the Water Right Determination and Administration Act of 1969[2] (1969 Act) with certain judicial duties and functions relating to claims to the use of waters arising therein.

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[1] These are identical with those presented at p. 2 of our brief in No. 87, as are the Government's questions in both cases, for all practical purposes.

[2] Colo. Rev. Stat. § 148-21-1, et seq. (1963), *as amended,* (1969).

The proper discharge of these duties requires jurisdiction over all interested and necessary persons.[3]

The Colorado River Water Conservation District is a public agency of the State of Colorado, embracing a 15-county area, established for the purpose of conserving and developing the waters of the Colorado River and its tributaries within the District area.[4] Water Division 5, in which this case arises, consists of " . . . all lands in the state of Colorado in the drainage basins of the Colorado river and all of its tributaries arising within Colorado, with the exception of the Gunnison River; . . ."[5] With that exception, Water Division 5 thus includes the Eagle River system which is involved in No. 87, this Term, as well as the rest of the Colorado River system within the State, in all of which the District has numerous rights and claims to the use of water under its statutory responsibilities.

Background of this case. This case commenced, as did No. 87, by service of a notice in conformity with 43 U.S.C. 666 (b)[6] upon the Attorney General of the United States. This notice contained a resume of ap-

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[3] "Person" is defined in § 148-21-3(2) as "an individual, a partnership, a corporation, a municipality, the state of Colorado, the *United States of America*, or any other legal entity, public or private." (emphasis added).

[4] Colo. Rev. Stat. § 150-7-1 (1963).

[5] Colo. Rev. Stat. § 148-21-8(6) (1963), *as amended*, (1969). It is important to note that Water Division 5 is for all practical purposes identical with what was formerly designated Irrigation Division 5. Under the former law there were seven such Irrigation Divisions for water rights administration purposes within the state just as there are now seven Water Divisions for like purposes.

[6] The requirements of Fed. R. Civ. P. 4(d)(4) were also observed.

plications concerning water rights in Division 5 made during December, 1969.[7]

In response to the language of the notice that "[y]ou are further notified that you have until the last day of March, 1970, to file with the water clerk a verified statement of opposition to any such application . . .", the Government on March 31, 1970, filed a motion to quash service together with a supporting memorandum. The motion asserted (1) that the proceedings were not of the kind to which the United States had consented to be sued and (2) that there had not been "service of process" within the meaning of 43 U.S.C. 666. The respondent court thereupon ordered that any rulings on applications filed with the water clerk be deferred until the motion of the United States had been heard and determined. The District filed an appearance and memorandum in opposition to the motion to quash and argument was heard by the respondent court on April 9, 1970.

In its order entered April 21, the respondent court held with regard to (1) that the rationale of the Colorado Supreme Court on jurisdiction in the case here now as No. 87 was equally appplicable, adding:

> ... Perhaps to greater degree, because the jurisdiction of the Court for Water Division No. 5 extends to a much larger area than the former water district which is involved in the case on certiorari and which is now included within Water Division No. 5. (Pet. 11).

---

[7] Other statutory requirements of notice were satisfied such as publication in newspapers published in each county in the Division and by mailings to affected persons, including those having specifically requested notice. Colo. Rev. Stat. § 148-21-18(3) (1963), *as amended*, (1969).

As to (2), the respondent court pointed out that the language of 43 U.S.C. 666(b) speaks of "Summons *or other process*", and the papers involved constituted notice properly served under the statutes involved (Pet. 12). While thus overruling the motion to quash, the respondent court noted it would entertain ". . . where appropriate, applications by the United States for reasonable extensions of time." (Pet. 13).

On May 4, 1970, the United States filed a "Motion for Extension of Time to File Statements in Opposition or Other Response." This motion made reference to the pendency of No. 87[8] in this Court and suggested an extension of time until this Court had spoken, anticipated to be by February, 1971. In further support of the motion, the Government stated:

> (2) The United States is in the process of gathering a catalog of its multitude of water rights within Water Division 5, but the cataloging procedure will not be completed in the immediate future. Therefore, the United States is unable at this time to determine the effect of the Water Right Applications filed upon its water rights. Hence, additional time is needed for the United States to physically gather the information needed to form a response.

On July 1, 1970, the respondent court denied this motion on the basis that it was obliged to proceed under the 1969 Act in the absence of any order or mandate from any appellate court to desist, noting that considerable time had already elapsed since its April ruling. That same day, the Government served the respondent court with a copy of an application for a writ of prohibition which was being filed in the Supreme Court of

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[8] At that time the Eagle County case was No. 1178, Oct. Term, 1969.

Colorado. This application did not seek a stay of the proceedings in the respondent court (cf. Pet. 4). Instead, it sought prohibition against the respondent court from asserting jurisdiction over the United States, or adjudicating any of its rights "for the reason that said Court and Judge are wholly without jurisdiction over the United States . . . .", in the identical language in which prohibition had been sought in what is now No. 87. The Supreme Court of Colorado, having already conclusively ruled in its opinion in that case that the respondent court did have jurisdiction, on July 9, 1970, denied *en banc* and without further opinion the application for prohibition. This petition for a writ of certiorari followed.

ARGUMENT

In seeking certiorari in No. 87, the United States assured this Court that there was finality of judgment below on the issue the United States wanted reviewed and that this issue was "clearly separable" from the merits of the litigation pending in the respondent court concerning the relative rights and priorities of claimants to water rights in Water District 37. This separable issue was whether:

> . . . the Colorado district court has jurisdiction under a federal statute to adjudicate the water rights of the United States, including its reserved rights . . . . (Pet. in No. 87 (No. 1178, Oct. Term, 1969) at 9).

We there supported certiorari and review by this Court now rather than later because it was clear that this basic jurisdictional question would persist throughout any Colorado water rights proceedings involving the United States.

The petition in No. 812 further evidences the persistence of this basic jurisdictional question. However, while acknowledging that the 1969 Act eliminated some of the infirmities alleged to exist in State law in No. 87, the United States needlessly complicates the basic jurisdictional question by complaining that ". . . the new procedures are, if anything, more burdensome on the government . . ." (Pet. 6).

It was our purpose in No. 87 to demonstrate to this Court the overwhelming intent of the Congress in enacting 43 U.S.C. 666 to subject all of the claims of the United States, including its reserved rights, to adjudication in state water rights proceedings.[9] This was clearly the objective despite any variances in State procedures which might be involved. The goal was to perfect the longstanding adjudicatory and administrative processes of the States by authorizing the joinder of the United States where the existence of its claims to the use of water made the Government's presence necessary, in order to achieve the requisite certainty in this field. The nature of these processes was not the problem. The problem was the necessity of the presence of the Government, if these processes were to be fully effective.

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[9] The proceedings in Congress over the 1949-1952 period concerning bills such as S. 18, "to authorize suits against the United States to adjudicate and administer water rights", and which resulted in 43 U.S.C. 666, are summarized in Brief for Respondents in No. 87 at 11-29, and pertinent documents are set forth therein at 1e-15e. A recent comment notes ". . . the complete absence [in] the legislative history of any indication that the McCarran Amendment was to apply to less than all of the federal water rights." Comment, *Adjudication of Federal Reserved Water Rights*, 42 U. Colo. L. Rev. 161, 166 (1970).

9 be recalled that the United

In this connection, it will on in No. 87 told the court

States in seeking prohibitio

below that if it:

the United States could ad-

> . . . were to hold that th hts in proceedings such as
> judicate all of its righ priority date of its reserved
> this and obtain the true pts, most of the objections of
> and appropriative right these proceedings would be
> the United States to th United States could not, even
> removed. While the U fendant under 43 U.S.C. sec.
> then be joined as a defe hat an *entire river system*
> 666, for the reason th the United States would be
> would not be involved, t its rights properly adjudi-
> assured it could have i ear as plaintiff in a Colorado
> cated if it chose to appe ation . . . (emphasis added)
> Water District applicat
> (A. 14, No. 87).

In the present petition the U United States says that ". . .
some of the defects of the ol old law have been eliminated
(*e.g.* each of the 70 districts cts under the old law encom-
passed only a small segment ent of a river system) . . ."
(Pet. 6). From this we can an assume that a major objec-
tion to being joined in Col colorado water adjudications,
i.e., the problem of the "en entire river system," is moot
under the 1969 Act. As far far as adjudicating "all of its
rights" and obtaining "th the true priority date of its
reserved and appropriative ive rights" are concerned, the
court below made it plain in beyond question that these
matters were not at all fore closed and that the respond-
ent court could bring befor fore it all those necessary to a
full determination of all cla claims once the United States
had presented its specific c ic claims for adjudication (A.
37-39, No. 87).[10]

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[10] It is clear to us that the filin filing of claims by the United States
seeking to antedate previous dec decrees and proceedings will neces-
sarily result in an "inter sese" viewed West End Irr. Co. v. Gar "adjudication. The court below
(1947), as probably controlling, Garvey, 117 Colo. 109, 184 P. 2d 476
this view of the United States (A ing, and was inclined to agree with
es (A. 38, No. 87).

We fail to see how the proceedings under the 1969 Act can vary these principles as enunciated by the court below. As is quite evident from its opinion, that court had the 1969 Act in mind and regarded ". . . as immaterial to the jurisdictional question presented . . ." (A. 22, No. 87), whether further proceedings in the case were under the new law or the old. The 1969 Act represents a streamlining of the adjudicatory procedures whereby Colorado has substituted a basin-wide court division concept for the previous smaller district concept and has freed, in some measure, the adjudicating court from the tedium of investigating claims, leaving this to a court-appointed referee. Nevertheless, the actions of the referee, and any protests and oppositions filed with regard to claims, go to the court for judicial disposition. While the United States downgrades the referee function calling it "extremely limited" and "administrative rather than judicial," the fact is that referee proceedings were provided for in the prior law, similarly under the supervision of the court. Though appearing to the Government to effect many "procedural" changes, the 1969 Act in fact simply draws from the previous adjudication procedures and case law relating thereto.[11]

In its petition, the United States makes clear to this Court that the identical subject matter which is involved in No. 87 is involved here:

> As in the former Water District 37, the United States claims two types of rights in the larger

[11] As the court below noted (A. 44, No. 87), the United States filed with it a supplemental brief on the subject of the effect of the 1969 Act upon the questions involved, if any. This supplemental brief advised that "upon careful review" of the 1969 Act the Government was of the opinion that its position below was "not affected in any significant way". (Record in No. 87, at R. 152).

> Water Division No. 5: *appropriative* rights acquired pursuant to state law, and *reserved* and other rights based on federal law . . . . (Pet. 5)

This statement, often repeated by the Government, illustrates the error of its position. Jurisdiction is specifically accorded to State courts under 43 U.S.C. 666 (a) where ". . . the United States is the owner of or is in the process of acquiring water rights by *appropriation under State law* . . ." (emphasis added). The Government concedes this (U.S. Brief in No. 87, at 5). Thus such claims of the United States *must* be subject to the jurisdiction of the State courts.[12] Certainly the United States in making such claims becomes a necessary party and cannot avoid jurisdiction by asserting the State procedures to be merely "administrative" or otherwise "burdensome". Being an admittedly "interested" and necessary party as to one class of rights, the Government should not be allowed to evade the Congressional purpose and render State adjudicatory proceedings meaningless by refusing to articulate *all* of its

---

[12] In fact, the U.S. Forest Service made two such applications in Water Division 5 in March, 1970. The notice and resume published for March, 1970, by the Water Clerk in the District Court in and for Water Division No. 5 included the following:

4. Case No. W-30, U.S. FOREST SERVICE—WHITE RIVER NATIONAL FOREST, P.O. BOX 948, Glenwood Springs, Colorado, 81601, CAMP HALE PASTURE DITCH, the Southeast Corner of Section 23, Township 7 South, Range 80 West of the Sixth Principal Meridian, bears South 46° 11'E., 1880 feet; decree for 1.02 cubic feet per second, with priority date of September, 1969, for irrigation purposes.

5. Case No. W-31, U.S. FOREST SERVICE—WHITE RIVER NATIONAL FOREST, P.O. BOX 948, Glenwood Springs, Colorado, 81601, CAMP HALE POND, located in Section 9, T. 7S., R 80W., Sixth Principal Meridian; decree for 37.51 acre feet, with priority date of October, 1968, for Fish and Wildlife.

claims to water. Congress very definitely not only did not intend such a result—it was legislating to achieve the opposite.

In testifying at the hearings as to the position of the Department of Justice on S.18 the Special Assistant to the Attorney General made the same objections to the proposed legislation as are now made in this petition. He said:

> You have a general waiver of immunity for every water right in the United States. You not only have a waiver of immunity, you subject us to the administration of every State. We would be forced—I went back and cheked this when I got through with my last conversation with you—we would be forced to have 17 different procedures west of the one hundredth meridian in which to try our litigation.[13]

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[13] Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess., at 14 (1951).

The Senate Judiciary Committee nevertheless reported the bill favorably, specifically taking note of the Justice and Interior Department objections and concluded in rejecting them "... after a consideration of all of the evidence available to the Committee, that the legislation is meritorious" (S. Rep. No. 755, 82d Cong. 1st Sess. 2 (1951)).

CONCLUSION

The basic question of jurisdiction is important and should be reviewed now by this Court.

Respectfully submitted,

KENNETH BALCOMB
DELANEY & BALCOMB
P. O. Drawer 790
Glenwood Springs, Colorado
81601

ROBERT L. MCCARTY
MCCARTY & NOONE
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

Nov. 6, 1970

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Summary of argument	7
Argument:	
I. Congress did not in 43 U.S.C. 666 consent to the joinder of the United States for the adjudication of its reserved water rights in state court proceedings	8
II. The monthly proceedings authorized by the Colorado Water Right Determination and Administration Act of 1969 are not suits to which the United States has consented to be joined under 43 U.S.C. 666 regardless of the nature of the rights claimed by the United States	11
Conclusion	14

CITATIONS

Cases:	
Dugan v. *Rank*, 372 U.S. 609	11
Miller v. *Jennings*, 243 F.2d 157 (C.A. 5), certiorari denied, 355 U.S. 827	11
United States v. *The District Court in and for the County of Eagle and State of Colorado*, No. 87, O.T. 1970, certiorari granted, 397 U.S. 1005	4

Statutes:

	Page
Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666	2, 5, 8, 9, 10, 11, 14
Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. 148-21-1 *et seq.*	3, 4, 8
Sec. 148-21-3	3
Sec. 148-21-18	3, 5, 12, 13
Sec. 148-21-18(1)	12
Sec. 148-21-19(2)	13
Sec. 148-21-22	4, 10
Sec. 148-21-44	6

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Colorado Supreme Court did not write an opinion. The opinion and order of the Water Court (App. 6-9) are not reported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on July 9, 1970 (App. 27). The petition

for a writ of certiorari was filed on October 7, 1970, and was granted on December 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether in 43 U.S.C. 666 Congress consented to suits against the United States in state courts for adjudication of its reserved water rights not predicated on state law.

2. Whether the congressional consent to suit in 43 U.S.C. 666 extends to monthly proceedings affecting federal water rights in which a water referee determines, without a formal hearing, water rights of those parties who have voluntarily filed water right applications during the preceding month.

STATUTES INVOLVED

The Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides in pertinent part:

> Suits for adjudication of water rights.
>
> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. * * *

The Colorado Water Rig
ministration Act of 1969,
et seq., provides in pertine

148-21-3. Definitio
of this article, unless
cates a different mea

(2) "Person means
ship, a corporation, a
Colorado, the United
other legal entity, pu

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148-21-18. Applicat
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application is filed. T
cation shall be twenty-

er Right Determination and Ad-
1969, Colo. Rev. Stat. 148-21-1
ertinent part:

finitions.—(1) For the purposes
unless the context clearly indi-
t meaning:

means an individual, a partner-
ion, a municipality, the state of
nited States of America, or any
y, public or private.

* * *

pplications for water rights or
rights—plans for augmentation.
son who desires a determination
ht or a conditional water right
t and priority thereof, including
that a conditional water right
ater right by reason of the com-
appropriation, a determination
a change of a water right, ap-
an for augmentation or biennial
onable diligence, shall file with
in duplicate a verified applica-
rth facts supporting the ruling
erson who wishes to oppose the
y file with the water clerk in du-
ed statement of opposition setting
to why the application should not
why it should be granted only in
rtain conditions. Such statement
ust be filed by the last day of the
following the month in which the
filed. The fee for filing an appli-
twenty-five dollars; and for filing

a statement of opposition, the fee shall be fifteen dollars.

* * * *

(4) The referee without conducting a formal hearing shall make such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition. The referee shall consult with the appropriate division engineer and may consult with the state engineer, the Colorado water conservation board, and other state agencies.

* * * *

148-21-22. Priorities junior to prior awards —when.—With respect to the divisions described in section 148-21-8, priorities awarded in any year for water rights or conditional water rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date; * * *.

STATEMENT

This case raises essentially the same issues involved in *United States* v. *The District Court in and for the County of Eagle and State of Colorado*, No. 87, this Term, certiorari granted, 397 U.S. 1005, but in the context of the Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. 148-21-1 *et seq.*, which has superseded the statutory provisions underlying the *Eagle County* case.

On February 11, 1970, the Attorney General received notice, pursuant to Section 148-21-18 of the 1969 Act and directed to "All Persons Interested in Water Applications in Said Water Division No. 5," that "the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969" (App. 17). There followed a list of water right applications giving brief descriptions of the water use. The notice concluded with the statement that "[y]ou are further notified that you have until the last day of March, 1970, to file with the water clerk a verified statement of opposition to any such applications, if you desire to oppose any such applications" (App. 25). The Attorney General has received similar notices listing water right applications filed during each month thereafter and, in addition, similar resumes of applications filed in Colorado's Water Divisions 4 and 6 during the month of December 1969.

In response to the December 1969 notice, the United States filed with the Water Court of Water Division 5 a motion to quash service on the grounds, *inter alia*, that the proceedings before the water court do not constitute the type of water rights adjudication with respect to which the United States has consented to be sued under 43 U.S.C. 666. The water court denied the Government's motion (App. 9). It recognized that the consent issue is presently before this Court in *Eagle County*, *supra*, which arose from an earlier Colorado water rights proceeding involving a portion of the same water rights here involved. The court was of the view that it was bound by the decision of the Colorado Supreme Court in *Eagle County*

unless and until that decision was overturned by this Court (App. 9). Subsequently, the government's request to extend the time within which to file an answer pending the resolution of *Eagle County* was also denied. Finally, the government applied to the Colorado Supreme Court for a writ of prohibition to stay the proceedings for lack of jurisdiction, which the latter court denied without opinion on July 9, 1970 (App. 27).

In *Eagle County*, the United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37, one of the then 70 water districts in Colorado. Subsequent to the district court's denial of the government's motion to dismiss that action for lack of jurisdiction, the 1969 Act was passed abolishing[1] the 70 water districts and replacing them with seven water divisions. Water Division No. 5 includes the area drained by the Colorado River and its tributaries (excluding the Gunnison River), and thus includes the former Water District 37 involved in the *Eagle County* case.

As in former Water District 37, the United States claims two types of rights in the larger Water Division No. 5: *appropriative* rights acquired pursuant to state law, and *reserved* and other rights based on

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[1] Section 148-21-44 of the 1969 Act provides that any pending proceedings under the old law not concluded by July 1, 1972, are to be transferred to the water judges for the divisions established by the new law. Additionally, any claimant in such pending proceedings may at any time withdraw and initiate new proceedings under the new law.

federal law, resulting principally from withdrawals of land from the public domain. Because of the size of new Water Division No. 5, however, the water rights of the United States involved in this case are more numerous than those involved in *Eagle County*.[2] The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior—through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife—uses water in Water Division No. 5 for recreational and other purposes. The Department of the Navy administers certain Naval Petroleum and Oil Reserves in the area which, when developed, would require water to accomplish the federal purpose for which the reservation was made.

SUMMARY OF ARGUMENT

We rely primarily on our brief submitted in *Eagle County, supra*, No. 87, this Term, and limit our discussion here to the significance of the changed Colorado water right adjudication procedures. In support of our argument that Congress did not consent to the adjudication of federal *reserved* water rights in state court proceedings, we point out that under the

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[2] The information in the remainder of this paragraph was furnished to us by the federal agencies involved, but is not reflected in the record at the present stage of the proceedings.

limited procedures of the 1969 Colorado Act, Colo. Rev. Stat. 148-21-1 *et seq.*, it is highly unlikely that the federal reserved rights will be recognized. Because Congress was undoubtedly aware of the fundamental inconsistency between reserved water rights existing under federal law and appropriative water rights—which the laws of the western states are designed to determine and protect—we submit that Congress plainly did not intend through the enactment of 43 U.S.C. 666 to jeopardize federal reserved rights by subjecting them to state adjudications, but intended merely to submit federal claims arising under state law to state procedures.

In Part II, we show that the monthly proceedings of limited scope authorized by the 1969 Colorado statute do not constitute the type of general adjudication to which the United States may be made a party under the federal consent statute.

ARGUMENT

I

Congress Did Not In 43 U.S.C. 666 Consent To The Joinder Of The United States For The Adjudication Of Its Reserved Water Rights In State Court Proceedings

The basic arguments supporting our position that Congress did not in 43 U.S.C. 666 consent to state court adjudications of the reserved water rights of the United States are set forth at length in our *Eagle County* brief at pages 10-19. Those arguments are equally applicable here and will be stated only to the extent necessary to show that, in our view, the 1969

Colorado Act reinforces the conclusions reached in that brief.

In *Eagle County* (Br. 10-11), we started with the premise that the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the land was withdrawn, subject only to water rights vested in others as of the date of withdrawal. After setting forth our interpretation of 43 U.S.C. 666 and its legislative history, we noted (Br. 16-17) that the concept of reserved water rights is fundamentally inconsistent with the appropriation system of water law prevalent in Colorado and other western states and that a construction of the consent statute which would subject federal reserved rights to state court proceedings would open the way for an attempt to adjudicate reserved rights out of existence.

In pursuit of this point, we had noted before the Colorado Supreme Court in *Eagle County* that reserved rights not only would not, but could not, be recognized in district court supplemental water adjudications, because the then applicable state statutes and decisional law precluded the granting of priority dates in such adjudications earlier than the date of the last prior water adjudication. The Colorado Supreme Court rejected this argument (*Eagle County* App. 40), ruling that under the general jurisdictional provisions of the Colorado Constitution, the state district court would have jurisdiction to consider reserved water right claims of the United States dating back to the withdrawal of the federal lands

in question. While we still question whether the district court in *Eagle County would* recognize such rights, we point out that the 1969 Act provides for a much narrower type of water adjudication proceeding and makes it highly unlikely that reserved water rights will be considered.

Section 148-21-22 of the 1969 Act provides:

> Priorities junior to prior awards—when.—With respect to the divisions described in section 148-21-8, priorities awarded in any year for water rights or conditional water rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date; * * *.

This provision would appear to foreclose as to all unadjudicated federal reserved—as well as appropriative—water rights, the recognition of pre-1969 priority dates. There thus appears to be no means under the 1969 Colorado statute for perfecting federal reserved water rights. This re-emphasizes our submission that an interpretation of 43 U.S.C. 666 as embodying consent to reserved water right adjudication might effectively eliminate federal reserved rights and drastically affect the management of federal lands in Colorado and other western states.[3]

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[3] To the best of our knowledge, none of the reserved water rights claimed by the United States in Water Division No. 5 relate to Indian lands. In the event this Court should rule that 43 U.S.C. 666 subjects federal reserved rights in general to state adjudication, there would remain the fur-

II

The Monthly Proceedings Authorized By The Colorado Water Right Determination And Administration Act Of 1969 Are Not Suits To Which The United States Has Consented To Be Joined Under 43 U.S.C. 666 Regardless Of The Nature Of The Rights Claimed By The United States

Again, we rely primarily on our *Eagle County* brief, in which we argued at pages 24-30 that the Colorado procedures there at issue did not provide for the type of adjudication proceedings covered by 43 U.S.C. 666. In our view, however, the new state procedures authorized by the 1969 Act to determine and administer water rights are even more clearly not within the scope of the federal consent statute than the procedures they supersede.[4]

The federal courts which have construed 43 U.S.C. 666 have concluded that Congress intended to waive the sovereign immunity of the United States only in general water right adjudications. See *Dugan* v. *Rank*, 372 U.S. 609, 618-619; *Miller* v. *Jennings*, 243 F.2d 157, 159 (C.A. 5), certiorari denied, 355 U.S. 827; *Eagle County* Br. 25-27. The essential elements of the proceedings to which the United States has

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ther question (not presented by this case) whether the consent statute covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public.

[4] One defect of the old procedures has been mitigated, however, since each of the seven new divisions is obviously more likely to encompass a stream system within the meaning of 43 U.S.C. 666 than were any of the 70 districts under the old law.

consented to be joined as a defendant, as described in these decisions as well as in the legislative history of the federal statute (see our Brief in No. 87, pp. 12-15), are that all the water users and all the water rights on a stream must be joined in the action before the court and all the rights of the parties be determined as between themselves. These elements constitute the essence of a "general adjudication."

The proceedings under the 1969 Act do not approach such a general adjudication. The only water rights involved in the monthly proceedings before the water referee are those for which an application was made during the preceding month and which are listed on the resume prepared by the water clerk. Section 148-21-18. The Act does not require that all or any particular number of claimants to water from a particular or common source be joined, nor does it provide for a determination *inter sese* of such claims. Neither the statute nor the notice thereunder demands or requires that the United States or any other water user in a division file an application or claim in order that it can be determined along with all others or even those included in the notice. Instead, the statute provides only that (Colo. Rev. Stat. 148-21-18(1)):

> Any person who wishes to oppose the application may file with the water clerk in duplicate a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions.

The result of the application and permitted response is that a water referee will consider the particular

month's applications and any statements in opposition filed and, without holding a formal hearing, make his ruling.[5]

In the instant case, the notice of applications filed during the month of December 1969 in Water Division 5 and mailed to the Attorney General contained 17 applications (App. 17-25). These 17 applications and any oppositions filed thereto delimit the subject matter of the proceedings before the referee pursuant to this notice. The proceeding is thus limited to a mere fraction of the rights and claimants to water from sources within the area of Water Division 5. Were the United States to respond to the December notice and file a statement in opposition, the result would not be a decree finally determining all of the rights to use water in the division among all claimants, but a ruling pertaining only to those 17 applications filed. As noted above (*supra*, p. 12), in response to this notice the United States is neither asked nor permitted to submit its claims. For the claims of the United States to be the subject of a decree, the United States must affirmatively initiate a proceeding by filing an application for a water right under Section 148-21-18.

Respondents may assert that there are compelling reasons why the United States should, as a matter of policy, voluntarily submit its claims to state courts

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[5] Under Section 148-21-19(2), the referee has the option of referring the matter to the water judge without making a ruling.

for determination.[6] That question, however, is not before the Court since 43 U.S.C. 666 is clearly not a statute directing the Department of Justice to initiate proceedings on behalf of the United States, but simply permits joinder of the United States as a defendant in proper suits. We submit that the limited monthly adjudication proceedings established by the 1969 Act are not the type of suits covered by the federal consent statute.

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

WALTER KIECHEL, JR.,
Deputy Assistant Attorney General.

SAMUEL HUNTINGTON,
Assistant to the Solicitor General.

EDMUND B. CLARK,
ROBERT H. WHALEY,
Attorneys.

JANUARY 1971.

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[6] See the brief of the State of Wyoming as *amicus curiae* filed in Eagle County, No. 87, this Term. The *amicus* briefs of other states make similar suggestions.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 413398 440

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

UNITED STATES OF AMERICA, *Petitioner*

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO; AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF OF RESPONDENT COURT AND THE COLORADO RIVER WATER CONSERVATION DISTRICT

KENNETH BALCOMB
DELANEY & BALCOMB
P. O. DRAWER 790
Glenwood Springs,
Colorado 81601

ROBERT L. MCCARTY
MCCARTY & NOURSE
1225 Conn. Ave., N. W.
Washington, D. C. 20036

Attorneys for Respondent and for the Colorado River Water Conservation District

January 12, 1971

Press of Byron S. Adams Printing, Inc., Washington, D. C.

INDEX

	Page
Opinions Below	1
Statutes Involved	2
Questions Presented	5
Statement	6
Summary of Argument	9
Argument	11
The Clear Jurisdiction of State Courts Under 43 U.S.C. 666 To Adjudicate Claims of the United States, Whether Labeled Appropriative or Reserved, May Not Be Ousted Either on Speculation That Those Rights Will Not Be Recognized or That State Processes Will Not Accommodate Them	11
Conclusion	19

CITATIONS

CASES:

California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 17

Dugan v. Rank, 372 U.S. 609 (1963) 17

Pacific Live Stock Co. v. Oregon Water Bd., 241 U.S. 440 (1916) 16, 17

United States v. The District Court in and for the County of Eagle and State of Colorado, No. 87, O.T. 1970, *certiorari granted*, 397 U.S. 1005 ..*in passim*

Page

STATUTES:

Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666 ..*in passim*

Colo. Rev. Stat. (1963), *as amended* (1969) .... *in passim*

148-21-3 3
148-21-8 6
148-21-17 4
148-21-18 6
148-21-20 ..... 4, 17
148-21-27 18
148-21-28 18
150-7-1 7

Fed. R. Civ. P. 4 (d)(4) 6

MISCELLANEOUS:

Hearings on S. 18 Before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess., (1951) 15

S. Rep. No. 755, 82d Cong., 1st Sess. (1951) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES OF AMERICA, *Petitioner*

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF OF RESPONDENT COURT AND THE COLORADO RIVER WATER CONSERVATION DISTRICT

OPINIONS BELOW

The opinion and order of the respondent court (unreported) appear in the Appendix at pp. 6-9. The order, without opinion, of the Supreme Court of Colorado denying application for a writ of prohibition appears in the Appendix at p. 27. The opinion of the

Supreme Court of Colorado in No. 87 is reported at 458 P.2d 760 and is reprinted at App. No. 87, 19-44.[1]

STATUTES INVOLVED

The Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666 provides as follows:

Suits for adjudication of water rights

(a) *Joinder of United States as defendant; costs.*

Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

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[1] Throughout this brief, in referring to the briefs and appendix in No. 87 we shall use "Br. No. 87" and "App. No. 87". Where the references are to the appendix or the Government's brief in this case (No. 812) we shall use only "App." or "Br.".

(b) *Service of summons.*

Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) *Joinder in suits involving use of interstate streams by State.*

Nothing in this section shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

In addition to those portions of the Water Right Determination and Administration Act of 1969[2] (1969 Act) quoted by the United States, the following portions thereof are deemed pertinent:

> 148-21-3. Definition.—(1) For the purposes of this article, unless the context clearly indicates a different meaning:
>
> * * * *
>
> (8) "Water right" means a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same.
>
> * * * *
>
> (10) "Priority" means the seniority by date as of which a water right is entitled to divert or conditional water right will be entitled to divert and the relative seniority of a water right or a conditional water right in relation to other water rights and conditional water rights deriving their supply from a common source.
>
> * * * *

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[2] Colo. Rev. Stat. (1963), as amended, 11 Colo. Rev. Stat. §§ 148-21-1 to 45 (1969 Perm. Supp.), as amended, Colo. Sess. L. ch. 103, 430 (1970), hereinafter cited Colo. Rev. Stat. and by reference to the specific section.

(13) "Abandonment of a water right" means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder.

* * * *

148-21-17. Administration and distribution of waters.—(1) The state engineer shall be responsible for the administration and distribution of the waters of the state, and in each division such administration and distribution shall be accomplished through the offices of the division engineer as specified in this article.

(3) In the distribution of water, the division engineer in each division and the state engineer shall be governed by the priorities for water rights and conditional water rights established by adjudication decrees entered in proceedings concluded or pending on the effective date of this article and by the priorities for water rights and conditional water rights determined pursuant to the provisions of this article. All such priorities shall take precedence in their appropriate order over other diversions of water of the state.

* * * *

148-21-20. Proceedings by the water judge.—(1) On . . . the first Tuesday of April and October in division 5 . . . the water judge for the . . . division shall commence hearings with respect to the subject matter of protests filed and orders of rereferral entered by the referee during the preceding six calendar months. Such matters shall generally be considered by the water judge in chronological order, however, the dates and times of hearings shall be adjusted by the water judge at his discretion for the convenience of persons involved or for other reasonable cause.

* * * *

(5) A decision of the water judge with respect to a protested ruling of the referee shall either confirm, modify, reverse or reverse and remand such ruling, and in the case of the modification of a ruling the decision may grant a different priority than that granted by the referee and may specify its own terms and conditions with respect to a change of water right or plan for augmentation. A decision of the water judge in regard to a matter which has been rereferred by the referee shall dispose fully of such matter and may contain such provisions as the water judge deems appropriate. The water judge shall confirm and approve as part of his judgment and decree a ruling of the referee with respect to which no protest was filed, provided that the water judge may reverse or reverse and remand any such ruling which he deems to be contrary to law.

(9) Appellate review shall be allowed to the judgment and decree, or any part thereof, as in other civil actions, but no appellate review shall be allowed with respect to that part of the judgment or decree which confirms a ruling with respect to which no protest was filed.

QUESTIONS PRESENTED[3]

(1) Whether under 43 U.S.C. 666, a State court in adjudicating water rights under State law can obtain jurisdiction over the United States.

(2) Whether, upon joinder of the United States pursuant to 43 U.S.C. 666, the United States must present all of the water rights it owns or claims, including those it may claim as reserved rights, for adjudication with the claims of others.

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[3] These are identical with those presented at p. 2 of our brief in No. 87, as are the Government's questions in both cases, for all practical purposes.

STATEMENT

This case raises in our view the identical questions, stated just above, as posed in *United States* v. *The District Court in and for the County of Eagle and State of Colorado, et al.*, No. 87, this term (hereinafter No. 87). There are, of course, certain factual differences which we treat in this statement, but the same basic issue of state court jurisdiction is presented in both cases.

This case commenced, as did No. 87, by service of a notice in conformity with 43 U.S.C. 666 (b)[4] upon the Attorney General of the United States. As a consequence of the Water Right Determination and Administration Act of 1969 (1969 Act), the notice was issued[5] by the District Court for Water Division 5, just as the notice in the proceedings now here as No. 87 was issued by the District Court for Eagle County. Under the 1969 Act, the District Court for Water Division 5 was given responsibility for water rights determinations[6] affecting ". . . all lands in the State of Colorado in the drainage basins of the Colorado River and all of its tributaries arising in Colorado, with the exception of the Gunnison River; . . .".[7] This by definition in-

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[4] The requirements of Fed. R. Civ. P. 4 (d) (4) were also observed.

[5] Other statutory requirements of notice were satisfied such as publication in newspapers published in each county in Water Division 5 and by mailings to affected persons, including those having specifically requested notice. Colo. Rev. Stat. § 148-21-18(3).

[6] The word "determination" is used in the 1969 Act and includes "adjudication" as used in previous acts.

[7] Colo. Rev. Stat. § 148-21-8(6). It is important to note that Water Division 5 is for all practical purposes identical with what was formerly designated Irrigation Division 5 under the former law. That prior law provided seven such Irrigation Divisions for water rights administration purposes just as there are now seven Water Divisions for like purposes.

cludes the area of the Eagle River system involved in No. 87, as well as an additional geographic area all within the confines of the Colorado River Water Conservation District.[8] The District has numerous claims to the use of water in its geographic area in furtherance of its statutory responsibilities and it was in this connection that the District appeared in the respondent court, just as it did in the respondent court in No. 87.

The notice served upon the Attorney General in this case advised that "[y]ou are further notified that you have until the last day of March, 1970, to file with the water clerk a verified statement of opposition to any such applications . . ." In response, on March 31, 1970, the Government filed a motion with the respondent court to quash service as to it on the principal ground that the United States had not consented to suit. This motion was opposed by the District. After briefing and oral argument the respondent court held that the rationale of the Colorado Supreme Court on state court jurisdiction in the case here as No. 87 was equally applicable to proceedings under the 1969 Act, adding:

> . . . Perhaps to greater degree, because the jurisdiction of the Court for Water Division No. 5 extends to a much larger area than the former water district which is involved in the case on certiorari and which is now included within Water Division No. 5. (App. 8).

---

[8] The District is a public agency of the State of Colorado embracing a 15 county area, established for the purpose of developing and conserving the waters of the Colorado River and its tributaries within the area of the District. Colo. Rev. Stat. (1963) § 150-7-1. Part or all of 8 of those counties are within the jurisdiction of the District Court for Water Division 5.

While thus overruling the motion to quash, the respondent court noted it would entertain, ". . . where appropriate, applications by the United States for reasonable extensions of time." (App. 9).

Following this, the United States filed with the respondent court a "Motion for Extension of Time to File Statements in Opposition or Other Response." The reference to "Statements in Opposition" clearly recognized the language of the notice that such statements should be filed by a day certain, and in support of more time the United States advised the respondent court:

> (2) The United States is in the process of gathering a catalog of its multitude of water rights within Water Division 5, but the cataloging procedure will not be completed in the immediate future. Therefore, the United States is unable at this time to determine the effect of the Water Right Applications filed upon its water rights. Hence, additional time is needed for the United States to physically gather the information needed to form a response.

But rather than selecting a time by which the catalog referred to would be available and within which the United States would respond, the motion suggested an extension until No. 87 had been disposed of here. The respondent court denied this motion.

The United States then applied to the Supreme Court of Colorado for a writ of prohibition. This application was not a request for a stay of the proceedings in the respondent court. Instead it asked in virtually the identical terms in which prohibition had been sought in the case now here as No. 87, that the writ issue to the respondent court "for the reason that

said Court and Judge are wholly without jurisdiction over the United States." (App. 2).

The Colorado Supreme Court had already decided precisely the opposite in the *Eagle County* case (No. 87) and thus promptly denied, *en banc*, the writ applied for (App. 27). The United States then filed here for certiorari and, just as in No. 87, we supported the application for the writ because of the importance of a decision now on the same basic question of jurisdiction which both cases present.[9]

SUMMARY OF ARGUMENT

The jurisdictional issue, which is all this Court need decide to dispose of both cases, was offered in sharp focus by the United States when it came here seeking certiorari in No. 87. There, after admitting the decision below did not terminate the entire litigation, to assure the Court there was finality of judgment below permitting review, the Government noted:

> ". . . Since [the jurisdictional] issue is *clearly separable* from the merits of the litigation pending in the State district court (the relative rights and priorities of the claimants of water rights in Water District 37), and is not subject to further review in the Colorado courts, the judgment is

[9] In conferences among counsel while the petition for certiorari was pending in No. 812 there was mutual recognition of the desirability for ongoing proceedings on water matters in the respondent court in the interests of the proper administration of the 1969 Act and, at the same time, of the effect that the various deadlines in that Act could have upon any rights of the United States in its absence. This led to an unopposed request for a stay by this Court, which stay has been implemented by agreement among counsel on the language to be inserted in decrees which will hold the rights of the United States in status quo pending the decision of this Court.

> final for purposes of this Court's jurisdiction...." (Pet. in No. 87, then No. 1178, Oct. Term, 1969 at 9, emphasis added).

This "clearly separable" issue, as stated by the United States was whether:

> . . . the Colorado district court has jurisdiction under a federal statute to adjudicate the water rights of the United States, including its reserved rights." (id.)

We have twice supported review on this issue because it is clearly in the interests of all concerned that it be answered now and not left for argument after the expense of trial on the merits.

But having brought the issue here so clearly the Government continues to blur it here by two contentions. The first of these—totally speculative—may be paraphrased thusly: It is "highly unlikely" that the state district courts would recognize federal reserved rights; even if they did, the adjudication of such rights in state court proceedings "would open the way for an attempt to adjudicate reserved rights out of existence"; and accordingly Congress could not have intended "to jeopardize" reserved rights by subjecting them to state adjudications (Br. 7-10). As we show below, this speculation not only reaches out for problems that are simply not here, but leads the Government to a rationalization of what Congress intended in enacting 43 U.S.C. 666 that is plainly at odds with the legislative history.

A second area of blurring is in connection with the procedures under state law. In this area we are told that neither the procedures in No. 87 nor in No. 812 provide for the type of adjudication proceedings con-

templated by 43 U.S.C. 666. But as we hereinafter show not only is the United States in error in the details it pursues, but again misconceives the thrust of 43 U.S.C. 666, which was to waive immunity in water rights adjudications despite the clearly understood differences in procedures in the states.

ARGUMENT

The Clear Jurisdiction of State Courts Under 43 U.S.C. 666 To Adjudicate Claims of the United States, Whether Labeled Appropriative or Reserved, May Not Be Ousted Either on Speculation That Those Rights Will Not Be Recognized or That State Processes Will Not Accommodate Them

The threshold error of the Government's position may be demonstrated in our view, from the following statement in its brief in No. 812, as follows (at 6-7):

> As in former Water District 37, the United States claims two types of rights in the larger Water Division No. 5: *appropriative* rights acquired pursuant to state law, and *reserved* and other rights based on federal law. . .

As to the appropriative rights, the Government concedes there is state court jurisdiction under 43 U.S.C. 666 (Br. No. 87, 5) and thus any claims so labeled *must* be advanced in the Water Division 5 proceedings.[10] We know the nature of most if not all of the

[10] In fact, the U.S. Forest Service made two such claims in Water Division 5 in March, 1970. The notice and resume published for March, 1970, by the Water Clerk in the District Court in and for Water Division No. 5 included the following:

4. Case No. W-30, U.S. FOREST SERVICE-WHITE RIVER NATIONAL FOREST, P.O. Box 948, Glenwood Springs, Colorado, 81601, CAMP HALE PASTURE DITCH, the Southeast Corner of Section 23, Township 7 South, Range 80 West of the Sixth Principal Meridian, bears South 46° 11′ E., 1880 feet; decree for 1.02

claims involved in No. 87 because the Government set them forth with particularity during the proceedings in the respondent court in that case.[11] Those claims would, of course, fall within what is now Water Division 5, and at least those labeled *appropriative* would be subject to determination by the respondent court in this case quite apart from any other claims which the United States should advance from the catalog which it told respondent court it was preparing.

As the holder of such claims to *appropriative* rights the Government is clearly a necessary party in the respondent court under 43 U.S.C. 666, for without its presence there could not be a complete adjudication of claims based on state law. But, just as clearly, if the Government is allowed to withhold some of its claims on the mere distinction of being *reserved* and not *appropriative,* there still would be an incomplete and thus meaningless adjudication. As we show in some detail in our brief in No. 87 (11-29), Congress enacted 43 U.S.C. 666 to obviate, not perpetuate, this result.

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cubic feet per second, with priority date of September, 1969, for irrigation purposes.

5. Case No. W-31, U.S. FOREST SERVICE-WHITE RIVER NATIONAL FOREST, P.O. Box 948, Glenwood Springs, Colorado, 81601, CAMP HALE POND, located in Section 9, T. 7S., R 80W., Sixth Principal Meridian; decree for 37.51 acre feet, with priority date of October, 1968, for Fish and Wildlife.

[11] App. No. 87, 6-9. The United States agrees that there is a misprint in this Appendix at p. 8 in the last sentence of paragraph (1). Instead of 954 c.f.s. the figure should be .954 c.f.s., so that the sentence should read: "Forseeable uses amount to .954 c.f.s. and 420.7 acre feet". The c.f.s. (cubic feet of water per second) measures a daily rate of flow. An acre foot is a measure of volume of water—one acre-foot covers one acre of land one foot deep.

The motion to dismiss in the respondent court in No. 87 and the motion to quash in the respondent court in this case both sought to extricate the United States from advancing *any* claims, however they might be labeled, yet there can be no question as to state court jurisdiction over those rights depicted as *appropriative*. At least to this extent, then, the Government cannot be upheld here. As far as *reserved* rights are concerned, the genius of the appropriation system is that such rights can be integrated with other rights once they are articulated as the Government has done in No. 87 and claims to be doing in No. 812. There is thus little if any distinction in the labels used. Indeed, as the United States advised the Colorado Supreme Court in seeking prohibition in No. 87, if that court:

> . . . were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication . . . (App. No. 87, 14).[12]

The United States speculates that the Colorado courts will not recognize its reserved rights, or, recog-

[12] It should be noted here that the alleged lack of "an entire river system" as the only objection raised to state court jurisdiction is now said by the United States to be a "defect [which] has been mitigated" by the 1969 Act (Br. 11, n. 4).

nizing them, will be "highly unlikely" to accord them the priority date to which they are entitled because of a provision of the 1969 Act subordinating priorities accorded thereunder to those previously entered (Br. 10). This assumption ignores the fact that this provision in the new statute is identical in effect to the previous statute which the United States acknowledges the Supreme Court of Colorado rejected as barring the right of the United States to its true priority date (Br. 9). This assumption also ignores the statement of the respondent court: "We are bound by and must follow . . . the rule of decision of the highest Court of this state. . ." (App. 9).

Nevertheless, the United States expresses fear that to submit its reserved rights to state court proceedings "would open the way for an attempt to adjudicate reserved rights out of existence." (Br. 9). The short answer to this is that it is just more speculation. Moreover, even though the United States has not submitted any rights for adjudication, the Colorado Supreme Court has already held:

> . . . whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately. Therefore, it would seem that no adequate reason exists to withhold reserved rights from the light of day and adjudication. (App. No. 87, 42-43).

We pass now to the procedural concerns imagined by the United States. At the outset, when Congress was considering the waiver in what became 43 U.S.C. 666, it was well aware state adjudicatory laws varied widely in procedure. Nothing exemplifies this more than the testimony of the Special Assistant to the At-

torney General in testifying at the hearings on S. 18. He said:

> You have a general waiver of immunity for every water right in the United States. You not only have a waiver of immunity, you subject us to the administration of every State. We would be forced—I went back and checked this when I got through with my last conversation with you—we would be forced to have 17 different procedures west of the one hundredth meridian in which to try our litigation.[13]

In full cognizance of such procedural differences, Congress nevertheless granted the waiver of immunity.

The effort to magnify procedural differences which allegedly exist between the 1969 Act and the previous law should be contrasted with what the United States said as between these two Colorado water rights procedures when applying for prohibition in what is now No. 87. As the court below noted (App. No. 87, 44), the United States filed with it a supplemental brief on the subject of the effect of the 1969 Act upon the questions involved. This supplemental brief advised that "upon careful review" of the 1969 Act the Government was of the opinion that its position below was "not affected in any significant way". (Record in No. 87, at R. 152). Indeed, the court below itself concluded the provisions of the 1969 Act to be ". . . immaterial to the jurisdictional question presented." (App. No. 87, 22).

The 1969 Act represents a streamlining of the adjudicatory procedures whereby Colorado has substituted a

[13] Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess., at 14 (1951).

basin-wide division concept for the previous smaller district concept and has freed, in some measure, the adjudicating court from the tedium of investigating claims, leaving this to a court-appointed referee. Nevertheless, all actions of the referee, and any protests and oppositions filed with regard to claims, go to the court for judicial disposition. While the United States in its petition in this case downgrades the referee function calling it "extremely limited" and "administrative rather than judicial," (Pet. 7), the fact is that referee proceedings were provided for in the prior law, similarly under the supervision of the court. Though appearing to the Government to effect many "procedural" changes, the 1969 Act in fact simply draws from the previous adjudication procedures and case law relating thereto.

In dealing with the 1969 Act in its brief here the United States says with regard to the resume ". . . in response to this notice the United States is neither asked nor permittted to submit its claims." (Br. 13). This is simply incorrect. Pursuant to the notice, all having claims within the Division are thereby on notice that if they do not file a statement of opposition or state any unadjudicated claims of their own by way of application, those objections or claims will be foreclosed as the process unfolds.[14] While the statute does

[14] This was true of every water right claimant under the previous law. It applies as well under any state system of adjudication known to respondents and the necessity therefor was well known to Congress in enacting 43 U.S.C. 666. In considering S. 18, one of the final precursor bills to 43 U.S.C. 666, the Senate Judiciary Committee quoted from this Court in Pacific Live Stock Co. v. Oregon Water Board, 241 U.S. 440, 447 (1916), to describe state water adjudicatory laws in part as follows: . . . All claimants are required to appear and prove their claims; no one can refuse with-

make provision for court-appointed referees to make initial investigations, the referee may simply refer the applications and the oppositions to the District Court for its disposition. In any event, any ruling by a referee is subject to judicial review in a formal hearing by the court[15] and the final ruling is embodied in a judgment and decree subject to appellate review.[16]

The brief of the United States goes no further in its reference to the procedures of the 1969 Act than mention of the referee (Br. 13) and thus ignores the full reach of the proceedings. The involvement of and supervision by the court every step of the way in making determinations of water rights of all claimants is readily apparent.[17] The proceeding before the re-

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out forfeiting his claim . . ." See S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951). The Committee report also notes (at 3-4) this Court's decision in California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). That case construes the Desert Land Act of 1877 and earlier Acts, as they relate to water, and describes the growth of appropriation law. It also discusses the Oregon Water Code and notes (at 153): "the procedural provisions of [that] act have been sustained as constitutional by this court," citing the Pacific Live Stock case, *supra*. For a discussion of S. 18 and related measures see our brief in No. 87, 14-29.

[15] Colo. Rev. Stat. § 148-21-20 (3).

[16] Colo. Rev. Stat. § 148-21-20 (9).

[17] The contention of the United States that this is not a general adjudication (Br. 11) is wide of the mark. As this Court noted in Dugan v. Rank, 372 U.S. 609, 618-19 (1963), 43 U.S.C. 666 was not applicable in a private suit to determine water rights but was intended to apply (quoting from the report of the Senate Judiciary Committee in S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951)), to an adjudication of "all of the rights of various owners on a given stream". In Pacific Live Stock Co. v. Oregon Water Board, *supra*, this Court recognized substantially the same distinction well before 43 U.S.C. 666 was enacted in refusing to

spondent court, now before this Court, is thus clearly a suit for the adjudication of water rights within 43 U.S.C. 666.

As rights are decreed under the 1969 Act they are to be tabulated with previously decreed rights, resulting in the integration and consolidation into priority lists of all appropriations of water from the same source.[18] The United States concedes that 43 U.S.C. 666 requires its presence in this process for at least part of its rights and advised the respondent court that the Government was "gathering a catalog of its multitude of water rights within Water Division 5", but despite this seeks to be excused by this Court from the entire process as to all of its rights. This is not only contrary to the plain meaning of 43 U.S.C. 666 but contrary as well to the result sought to be achieved by such legislation, where in the making of the legislative history all of the arguments made here by the United States were considered and rejected.

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enjoin a proceeding before the Oregon Water Board because of pending suits between private parties over water rights, holding:

> . . . They are merely private suits brought to restrain alleged encroachments upon the plaintiff's water right, and . . . do not require any other or further determination respecting those waters. Unlike them, the proceeding in question is a quasi public proceeding, set in motion by a public agency of the state. All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding . . .

As we indicate in n. 14, *supra*, Congress was fully conversant with this case in enacting 43 U.S.C. 666.

[18] Colo. Rev. Stat. §§ 148-21-27 to 28.

CONCLUSION

This case and No. 87 present the identical question of state court jurisdiction resolved in favor of such jurisdiction by the Colorado Supreme Court. The doubts and speculations by the United States as to what *might* happen under the 1969 Act if it articulates its claims, add nothing to this basic question. Jurisdiction to consider all claims of the United States to the use of water was granted in 43 U.S.C. 666 as a matter of fairness and for the very practical reasons that there would be no certainty in water rights adjudications where the United States, if an owner or claimant, remained absent, and all such claims could be quantified under the long-developed adjudicatory systems of the appropriation states. The court below should thus be affirmed.

Respectfully submitted,

KENNETH BALCOMB
DELANEY & BALCOMB
P. O. Drawer 790
Glenwood Springs,
Colorado 81601

ROBERT L. MCCARTY
MCCARTY & NOONE
1225 Conn. Ave., N.W.
Washington, D. C. 20036

Attorneys for District Court and for the Colorado River Water Conservation District

February 12, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 812

UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

REPLY BRIEF FOR THE UNITED STATES

Respondents in this case, as in the companion case, No. 87, have consistently refused to recognize the significant difference between the reserved water rights of the United States and water rights it acquires by appropriation under state law or by purchase from other appropriators. Thus, in No. 87, they assert (Br. 30–37) that there is no need even to discuss the reservation doctrine because the United States has not yet specified its exact claims thereunder and consequently has not yet been deprived of

417-441—71

any rights. And here (Br. 10, 14), respondents insist that the distinction between reserved rights and rights acquired under state law is irrelevant because any possible harm to or loss of the former is speculative.

As we pointed out in our opening brief in No. 87 at page 12, 43 U.S.C. 666 does not refer to reserved rights and would appear syntactically, in fact, to exclude them. We showed there (No. 87, Br. 12–15) that the pertinent legislative history indicates that Congress was concerned primarily with the difficulties encountered in ordinary general water adjudications where rights acquired under state law were asserted. Such adjudications as a practical matter could not be accomplished where the United States owned or claimed rights acquired under state law. To alleviate that problem, Congress passed 43 U.S.C. 666 permitting the United States to be joined as a defendant in state water right adjudications when certain conditions had been met. The rights of the United States acquired under state law can then be determined and correlated with those of other water claimants.

Contrary to respondents' assertions (Br. 12), construction of the consent statute to apply to reserved rights would not significantly advance state water right adjudications. The need and reasonable requirements for water on federal lands withdrawn from the public domain are continuously changing to accomplish the purposes for which the withdrawals were made. The establishment of the Naval Oil Shale Reserve, for example (see p. 7 of our brief in this case), contemplated a need for water for the future development of the oil

shale. Because no satisfactory method of utilizing that resource has yet been discovered, the exact amount of water needed cannot be ascertained at this time. Similarly, although perhaps to a lesser extent, the water requirements for the national forests vary as conditions change and as better methods of silviculture are developed. We do not contend that these examples prove that the water requirements of a federal reservation can never be quantified. See *Arizona* v. *California,* 373 U.S. 546, 596, 601. But it is clear that the requirements of many reserves cannot be fixed for all time at a given instant. Consequently, even if 43 U.S.C. 666 included consent to reserved right adjudication, the fixed finality of all rights *inter sese* could not be attained and any decree would, of necessity, remain open-ended to accommodate future quantification of reserved rights as development plans for federal lands progress. Accordingly, any attempted adjudication of reserved water rights in state proceedings would only needlessly complicate the adjudicatory process by which rights arising under state law are established. Given these facts plus the fact that appropriative water rights were the focal point of Congress' concern, we submit that it would be inappropriate to construe 43 U.S.C. 666 to cover reserved water rights.

Again contrary to respondents' contentions (Br. 15–18), the procedures embodied in the Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. 148–21–1 *et seq.,* are not adequate to protect the reserved water rights of the United States.

The 1969 Act provides for monthly determinations and states that all water rights awarded in such proceedings shall be junior to rights awarded in previous years or embodied in decrees entered prior to the effective date of the Act. Thus, under the new Colorado procedure, the United States is precluded from obtaining a priority based upon pre-1969 withdrawals or reservations, and any rights awarded (reserved or other) would be junior to all prior awards or decrees, regardless of the date of actual appropriation or reservation. A statutory scheme leading to such a result is plainly inconsistent with the reserved rights of the United States as defined by this Court in *Arizona* v. *California,* 373 U.S. 546, 595–601. There is no reason to believe that Congress intended in 43 U.S.C. 666 to subject the federal reserved rights to such possible diminution.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in our opening brief, the decision of the Colorado Supreme Court should be reversed.

Respectfully submitted.

EDWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
WALTER KIECHEL, JR.,
Deputy Assistant Attorney General.
SAMUEL HUNTINGTON,
Assistant to the Solicitor General.
EDMUND B. CLARK,
Attorney.

FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

SUBJECT INDEX

Page

Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest and Points and Authorities in Support Thereof, and Order Thereon 1

Order on Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest and Points and Authorities in Support Thereof 3

Suggestion of Interest of the Fort Mojave Tribe of Indians and Points and Authorities in Support Thereof 5

1. Prior Adjudication of the Right to Water by the Fort Mojave Tribe of Indians Clearly Established Their Interest in the Subject Matter of the Case at Bar 5

2. The Fort Mojave Tribe and Other Tribes Similarly Situated Will Be Irreparably Damaged if Their Rights to the Use of Water Are to Be Henceforth Adjudicated in State Courts 8

Memorandum of Points and Authorities 14

TABLE OF AUTHORITIES CITED

Cases	Page
Arizona v. California, 298 U.S. 558	16
Arizona v. California, 373 U.S. 546, 83 S. Ct. 1468	5, 6, 8, 9
Booth v. Fletcher, 101 F. 2d 676, 101 F. 2d 676	15
Calnevari Corporation v. River Farms, Inc., No. 62-361-K Civil, United States District Court, So. Dist. of Calif., Central Division (1965)	15
Calhoun County, Fla. v. Roberts, 137 F. 2d 130	15
Florida v. Georgia, 58 U.S. 478	15
Goldberg v. Daniels, 231 U.S. 218	17
Haile v. Saunooke, 148 Fed. Supp. 604, aff'd 246 F. 2d 293, cert. denied 78 S. Ct. 268	21
KVGS, Inc. v. Associated Press, 299 U.S. 269	16
Louisiana v. Garfield, 211 U.S. 70	17
Maricopa County v. Valley Bank, 318 U.S. 357	16
McNutt v. General Motors Corp., 298 U.S. 178	16
Minnesota v. United States, 305 U.S. 382	16, 21
Oregon v. Hitchcock, 202 U.S. 60	17
Partan, et al., 132 F. 2d 886	21
Stanley v. Schwalby, 147 U.S. 508	15
Stanley v. Schwalby, 162 U.S. 255	17
Thebo v. Choctaw Tribe of Indians, 66 Fed. 372	17
Turner v. United States, 248 U.S. 354	21
Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F. 2d 529	21
United States v. Alabama, 313 U.S. 274	16
United States v. McShan v. Sherrill, 283 F. 2d 462	21

Page

United States v. Shaw, 309 U.S. 495 21

United States v. Sherwood, 312 U.S. 584 21

United States v. U.S. Fidelity & Guar. Co., 106 F. 2d 804, 309 U.S. 506 21

Wetmore v. Rymer, 169 U.S. 115 16

Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269 14

Worcester v. Georgia, 6 Pet. 515, 31 U.S. 515 14

Rules

Federal Rules of Civil Procedure, Rule 12(b) 16

Statutes

Public Law 280, 67 Stat. 589 .....11, 14

United States Code, Title 28, Sec. 1360 14

United States Code, Title 28, Sec. 1360(b) 11, 14, 16

United States Code, Title 43, Sec. 666 .....8, 12

Textbook

Barron & Holtzoff (Wright), Federal Practice and Procedure, Sec. 352 15

IN THE

Supreme Court of the United States

October Term, 1970
No. 812

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, *et al.*

Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest and Points and Authorities in Support Thereof, and Order Thereon.

COMES NOW the Fort Mojave Tribe of Indians, by Raymond C. Simpson, Tribal Attorney, at the discretion and the authority of the Tribal Council and without entering their appearance as a party, moves the Court for leave to file their Suggestions of Interest and Points and Authorities in Support Thereof.

Dated: April 8, 1971.

RAYMOND C. SIMPSON,
Tribal Attorney for Fort Mojave Tribe of Indians.

IN THE

Supreme Court of the United States

October Term, 1970
No. 812

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, *et al.*

Order on Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest and Points and Authorities in Support Thereof.

Based upon the foregoing motion, and good cause appearing therefore, It Is Ordered that the Fort Mojave Tribe of Indians' motion for leave to file a Suggestion of Interest and Points and Authorities in support thereof is granted.

Dated: This .... day of ....., 1971.

.....

UNITED STATES SUPREME COURT JUDGE.

IN THE

Supreme Court of the United States

October Term, 1970
No. 812

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, *et al.*

Suggestion of Interest of the Fort Mojave Tribe of Indians and Points and Authorities in Support Thereof.

Comes Now the Fort Mojave Tribe of Indians by Raymond C. Simpson, Tribal Attorney, under the direction and by the authority of their Tribal Council, without submitting to the jurisdiction of the Court, and appearing specially, solely and only for the purpose of suggesting to this Honorable Court that said Indian Tribe has a direct, immediate, and vital interest in the subject matter of the above-entitled action and that they are indispensable parties thereto by reason of the following:

1. **Prior Adjudication of the Right to Water by the Fort Mojave Tribe of Indians Clearly Established Their Interest in the Subject Matter of the Case at Bar.**

This Honorable Court in *Arizona v. California,* 373 U.S. 546, 83 S. Ct. 1468 decreed that the Fort Mojave Tribe has clear and definite legal rights to use

the water from the mainstream of the Colorado River when they said:

> "We also agreed with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."

These legal rights to the use of said water accords to them an entitlement of approximately 122,640 acre feet of water annually. At least seventy per cent (70%) of the water flowing to the Fort Mojave Indian Reservation from the mainstream of the Colorado River originates in the State of Colorado. A very substantial part of that water, so essential to the implementation of the portion of the Court's decree in *Arizona v. California, supra,* regarding the Fort Mojave Indians, is the Eagle River. Without this source of water supply, the water rights of the Mojaves would, of course, become vacuous since the entitlement of the Mojaves to water from the mainstream of the Colorado River is totally dependent upon the water supplied by its tributaries. As a consequence, any reduction of water in the Colorado River by reason of Eagle River (tributary) use clearly creates an intolerable plight for the Fort Mojave Indians because such upstream use will materially reduce the quantities of water entering the mainstream of the Colorado River which would otherwise flow to the Fort Mojave Indian Reservation. This is particularly significant since it is a matter of indisputable record that the Colorado River has been most seriously over-appropriated. In fact, it is also a matter

of record that current water yields reaching the Fort Mojave Indian Reservation are falling far short of the anticipated flows when the River was originally apportioned between the Upper and Lower Basins of the Colorado.

Examination of the Map of the Colorado River Basin appended hereto as Appendix A, and by reference made a part hereof, graphically illustrates the flow of the tributaries into the mainstream of the Colorado River and its flow into and through the Fort Mojave Reservation.

It is, of course, elemental that the said decreed rights to the use of water by the Fort Mojave Indian Tribe in the mainstream of the Colorado River and its tributaries are interests in real property of the highest dignity. Those rights, as asserted above, although in the mainstream of the Colorado River, in order to be meaningful, must extend to the sources of that water, *i.e.*, the tributaries of that stream such as the Eagle River. It is this fundamental property interest of the Fort Mojave Indians that causes them to have a direct, immediate, and vital interest in the subject matter of the above-entitled case plus making them an indispensable party thereto. Any other conclusion has been carefully characterized by William H. Veeder, attorney at law and well-known Conservation Specialist for the Bureau of Indian Affairs, in his special Report to the Commissioner of Indian Affairs entitled "Conflicts of Interest In Proceedings Before the Supreme Court of the United States", as "A Preface To Disaster For The American Indian People." A true and correct copy of said Report was Appendix B in our filing in Eagle River Case No. 87 which we adopt by reference and make a part hereof. Said Report was released on March

23, 1971, and is concerned exclusively with the Eagle River Case No. 87 and Water Division No. 5 Case No. 812.

2. The Fort Mojave Tribe and Other Tribes Similarly Situated Will Be Irreparably Damaged if Their Rights to the Use of Water Are to Be Henceforth Adjudicated in State Courts.

On March 24, 1971, one day after release of the said Veeder Report, this Honorable Court rendered a decision in the Water Division No. 5, declaring that Section 666 of Title 43 of the United States Code is an all-inclusive statutory provision that subjects to general adjudication in state proceedings, all rights of the United States to water within a particular state's jurisdiction, regardless of how they were acquired. Therein specific reference was made to this Court's decree in *Arizona v. California, supra,* with the Court expressly stating that "In *Arizona v. California* we were primarily concerned with Indian reservations." Nevertheless, at no place in the decision pertaining to Water Division No. 5 is there any distinction drawn between the entitlement of the United States and the Indian entitlement vested in the United States as trustee thereof, the latter being "private" as opposed to public in character. The Indian rights are distinct and separate from those rights claimed and administered by the agencies of the Forest Service and the Bureau of Land Management alluded to in the said Eagle River case. In other words, it is submitted that there has been a shocking failure by the United States as trustee for the Indians, to distinguish or to indeed even make any reference to the private rights of the Fort Mojave Indians, or any other Indians similarly situated, in the Water Division No. 5 case. The validity of this conclusion

is completely and forcefully documented in our Appendix B.

This failure is all pervasive, and is exemplified by a quotation from the Petition of Certiorari in Water Division No. 5 Case 812 (companion case to Eagle River Case No. 87). Therein it was stated:

> "Reserved rights (of the United States) have been defined by this Court as the entitlement of the United States to use as much water from sources on land withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to the water rights vested as of the date of the withdrawal. *Arizona v. California,* 373 U.S. 546, 596-601." *Petition for Writ of Certiorari**. Case No. 87 on page 3.*

The paraphrasing of the decision of *Arizona v. California, supra,* as last cited, is truly critical to the Fort Mojave Tribe because most assuredly the Mojave rights are not an "entitlement of the United States to use**" water. Rather, the citation, when considered in context, revealed the Mojaves and other Indians similarly situated have rights to the use of water which have been recognized and distinguished from those of the United States for public purposes.

Again failure to establish the all important difference between the "private" rights of the Indians, held in trust for them by the United States, from those of the Federal Government, held for the public as a whole, is found in this statement from the brief filed with the Supreme Court:

> "As indiciated previously** the United States unquestionably has the right to use as much water

> from sources on lands withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn**".

Not only is the statement incorrect, but it should be noted that the cases cited in the brief to support the contention relates exclusively to Indian rights as opposed to public rights. These cases are found in the brief for the United States, Case No. 87 on page 10, all of which underscores the imperative need to distinguish the Indian rights from those of the public.

In keeping with the tone and temper of said erroneous excerpt quoted from the Petition of Certiorari and the briefs filed in Case No. 87 is still another excerpt taken from the Petition and paraphrased in the brief to the effect that: "The magnitude of the problem is indicated by the fact that about four hundred forty-three million acres have been withdrawn from the Public Domain for use as Indian reservations, national parks, national forest, national recreation areas, national monuments, etc." Petition for Certiorari** on pages 10-11. Failure to separate and distinguish the real property rights of the American Indians from the public rights evidences the unfair and incorrect position which the United States has presented to the Supreme Court in regard to the private interests of the Indian which is potently spelled out and detailed in said Appendix B. From the legal standpoint this presents an intolerable situation for the Fort Mojave Indian Tribe and for all other American Indians whose rights to use of water are in effect intermingled with the "reserve" rights of the United States to the use of water for the public at large.

It is respectfully submitted that perhaps a fatal blow to the Indian interests was, we believe, inadvertently

delivered by Justice Douglas when he also failed to distinguish the Indian real property interests in his decision of March 24, 1971, in the Water Division No. 5, Case 812. Therein he stated:

> "As we said in *Arizona v. California,* 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' Id., at 597. The federally reserved lands include any federal enclave. In *Arizona v. California* we were primarily concerned with Indian Reservations. Id., 598-601. The reservation of waters may be only implied and their amount will reflect the nature of the federal enclave. Id., 600-601."

It cannot be denied that this quoted statement of Justice Douglas fails to distinguish the private Indian rights involved from the public rights of the United States. It must also be admitted that one can reasonably conclude therefrom that the private Indian rights will henceforth be governed by this Court's holding therein that state courts have jurisdiction to adjudicate the reserved water rights of the United States. Furthermore it should be observed that this court made its decision herein without distinguishing the Indian rights despite a clear declaration by the Congress of the United States that no state shall have jurisdiction "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of" property still held in trust by the United States for Indians, and that Congress expressly included water rights therein. Public Law 280 (67 Stat. 589, 28 U.S.C. Sec. 1360(b)).

The gravest consequence to the Fort Mojave Tribe of Indians will necessarily ensue by the failure of the pe-

titions for certiorari and the brief in Water Division No. 5 Case No. 812 to point out to the Supreme Court that the waiver of sovereign immunity from suit under 43 U.S.C. 666 does not in any way pertain to Indian rights nor to their use of water. It is basic law that unless the Indian immunity from suit is specifically waived by the Congress that immunity is unimpaired. From the language of 43 U.S.C. 666, it is manifestly clear that the Congress did not intend to include the rights of the American Indians within the scope of that waiver. If construction of the Act were permissible, which is denied, the legislative history would result in the rejection of any concept as to the applicability of the Act to the Indian rights and interests. This failure to distinguish the Indian rights from the public rights of the United States government could therefore result in subjecting the rights of the American Indians to adjudication thereof under the laws of the states. Because the state laws governing the rights of the use of water are frequently incompatible with the laws governing the Indian rights to the use of water, the extreme prejudice to the Indian rights becomes patently clear. In short, the repeated failure of the Federal government, as trustee for the Indians, to bring to the Supreme Court's attention the significant disparity between the laws governing Indian rights and the laws governing the public rights of the United States, could result in serious impairment or extinguishment of the Indian rights. Thus, failure to clarify this Water Division No. 5 Case No. 812 sufficiently mud-

dies the waters so that it is not an over statement to declare that the Indian real property rights, to a large extent, might be seriously infringed upon or completely extinguished.

Wherefore, the Fort Mojave Tribe of Indians respectfully represent:

I.

That the Fort Mojave Tribe of Indians is a necessary and indispensable party to this action but they cannot be made parties thereto since Congressional consent therefore has not been granted, and no order, judgment or other action of this court could or would be effective against the Fort Mojave Tribe of Indians or any other Indians similarly situated.

II.

That this Court is without jurisdiction in the premises, and that this Court's decision of March 24, 1971, in Water Division No. 5, Case No. 812, should therefore be vacated and a dismissal of the action ordered *sua sponte* due to lack of jurisdiction.

RAYMOND C. SIMPSON,
Tribal Attorney.

MEMORANDUM OF POINTS AND AUTHORITIES.

In the early landmark case of *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 515, Chief Justice Marshall declared in unequivocal language that Indian tribes are distinct political entities with the right of self-government, having exclusive authority within their territorial boundaries and that they are not subject to the laws of the states in which they might be located. The broad principles of the said *Worcester* decision have been adhered to by the courts ever since, and were reaffirmed by this Honorable Court as late as *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269.

The Fort Mojave Indian Reservation is geographically located in the States of Arizona, California, and Nevada with the mainstream of the Colorado River running directly through it. All three of said States have from time to time attempted to impose their laws upon the Fort Mojave Tribe of Indians who, in turn, have resisted by relying upon their legal rights as described in the *Worcester* case. In 1953 the picture of state encroachment was displayed before the Congress of the United States with the accompanying argument that "law and order" required that the respective states be granted a limited jurisdiction. Congress agreed and proceeded to pass Public Law 280 (28 U.S.C. 1360) for that limited purpose, but was emphatic in Section 1360(b) thereof that real property rights, including land and water, still held in trust by the United States for the benefit of Indians, did not become subject to the jurisdiction of any state or its political subdivisions. Hence, when this Court, in rendering its decision in Water Division No. 5, Case No. 812, held that the State of Colorado had jurisdiction to adjudicate the

reserved rights of the United States, it was acting contrary to Congressional mandate unless it is made clear that said decision is in no way applicable to the privately owned property rights of the Indians, held in trust by the United States.

I.

A Suggestion of Interest is the accepted method of bringing to the attention of the Court the interest of an entity such as an Indian tribe in the subject matter of a suit, and the Court's lack of jurisdiction of any suit designed to circumscribe, limit and affect such an entity in the use and enjoyment of its property or property rights.

Calnevari Corporation v. River Farms, Inc., No. 62-361-K Civil, United States District Court, So. Dist. of Calif., Central Division (1965);

Stanley v. Schwalby, 147 U.S. 508 (1893);

Florida v. Georgia, 58 U.S. 478 (1854);

Calhoun County, Fla. v. Roberts, 137 F. 2d 130 (C.A. 5, 1943);

Booth v. Fletcher, 101 F. 2d 676, 101 F. 2d 676 (C.A. D.C. 1939).

Barron & Holtzoff (Wright); Federal Practice and Procedure Section 352.

II.

A suggestion of interest by the Fort Mojave Tribe of Indians showing an interest in water rights by way of reference to a decree of this Honorable Court granting them specific water rights, or to an Act of Congress prohibiting State adjudication thereof, should be sufficient to show that they are an indispensable party.

When a question of the District Court's jurisdiction is raised, either by a party or by the Court on its own motion, the Court may inquire by affidavits or otherwise, into the facts as they exist. F.R.C.P. Rule 12(b);

1360(b) Title 28 of the U.S. Code states:

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights,* belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.*" (Emphasis ours).

Wetmore v. Rymer, 169 U.S. 115, 120-121;
McNutt v. General Motors Corp., 298 U.S. 178;
KVGS, Inc. v. Associated Press, 299 U.S. 269.

III.

The Indians are indispensable parties in any case involving property in which they have an interest.

Maricopa County v. Valley Bank, 318 U.S. 357 (1943);
United States v. Alabama, 313 U.S. 274 (1941);
Minnesota v. United States, 305 U.S. 382 (1939);
Arizona v. California, 298 U.S. 558 (1936).

IV.

The title or property interest of the Fort Mojave Indian Tribe is put in issue when an Indian Tribe claims an interest.

Louisiana v. Garfield, 211 U.S. 70;
Stanley v. Schwalby, 162 U.S. 255;
Oregon v. Hitchcock, 202 U.S. 60;
Goldberg v. Daniels, 231 U.S. 218;

V.

Indian Tribes under the tutelage of the United States are not subject to suit without the consent of Congress, and Congress alone can authorize such a suit.

Thebo v. Choctaw Tribe of Indians, 66 Fed. 372 (1895)

wherein the Court said:

"It may be conceded that it would be competent for Congress to authorize suit to be brought against the Choctaw Nation upon any and all the causes of action in any court it might designate. Acts of Congress have been passed, specially conferring on the courts therein named jurisdiction over all controversies arising between the railroad companies authorized to construct their roads through the Indian Territory and the Choctaw Nation and the other nations and tribes of Indians owning lands in the territory through which the railroads might be constructed. Other acts have been passed authorizing suits to be brought by or against these Indian Nations in the Indian Territory to settle controversies between them and the United States and between themselves.

Among such acts are the following: 'An act for the ascertainment of amount due the Choctaw

Nation.' 21 Stat. 504. Act of July 4, 1884 (23 Stat. 73), granting the right of way through the Indian Territory to the Southern Kansas Railway Company. An act granting right of way through Indian Territory to Kansas & Arkansas Valley Railway Company, 24 Stat. 73. An act granting the right of way through the Indian Territory to the Kansas City, Ft. Scott & Gulf Railway Company. Id. 124. An act granting the right of way through Indian Territory to Ft. Worth & Denver City Railway Company. Id. 419. An act granting the right of way through Indian Territory to the Chicago, Kansas & Nebraska Railway Company, Id. 446. An action granting right of way through the Indian Territory to the Choctaw Coal & Railway Company. 25 Stat. 35. An act granting the right of way to the Ft. Smith & El Paso Railway Company through the Indian Territory. Id. 162. An act granting the right of way to Kansas City & Pacific Railway Company through Indian Territory. Id. 140. An act granting the right of way to Paris, Choctaw & Little Rock Railway Company through the Indian Territory. Id. 205. An act granting right of way to Ft. Smith, Paris & Dardanelle Railway Company through Indian Territory. Id. 745. An act to authorize the Kansas & Arkansas Valley Railway Company to construct an additional railroad through the Indian Territory. 26 Stat. 783.

The constitutional competency of Congress to pass such acts has never been questioned, but no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act

of congress expressly conferring the jurisdiction in the particular case (pp. 373-374).

Being a domestic and dependent state, the United States may authorize suit to be brought against it. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject matter of the controversy was particularly specified, and was of such a nature that the public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. 'It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but it may if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state.' *Beers v. Arkansas,* 20 How. 527. The United States has waived its privilege in this regard, and allowed suits to be brought against it in a few specified cases. Some of the states of the Union have at times claimed no immunity from suits, but experience soon demonstrated this to be an unwise and extremely injurious policy, and most, if not all of the states after a brief experience, abandoned it, and refused to submit themselves to the coercive process of judicial tribunals.

When the Supreme Court of the United States in *Chisholm v. Georgia,* 2 Dall. 419, decided that under the constitution the court had original jurisdiction of a suit by a citizen of one state against another state, the eleventh amendment to the constitution was straightway adopted, taking away this jurisdiction. Since the adoption of this amendment, the contract of a state 'is substantially without sanction, except that which arises out of the honor and good faith of the state itself; and these are not subject to coercion'. In re Ayers, 123 U.S. 443, 505, 8 Sup. Ct. 164. One claiming to be creditor of a state is remitted to the justice of its legislature. It has been the settled policy of Congress not to sanction suits generally against these Indian Nations or subject them to suits upon contracts or other causes of action at the instance of private parties. In respect to their liability to be sued by individuals, except in the few cases we have mentioned, they have been placed by the United States, substantially, on the plane occupied by the states under the eleventh amendment to the constitution. The civilized Nations in the Indian Territory are probably better guarded against oppression from this source than the states themselves, for the states may consent to be sued, but the United States has never given its permission that these Indian Nations might be sued generally, even with their consent. As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. The intention of Congress to confer such a jurisdiction upon any court

would have to be expressed in plain and unambiguous terms (pp. 375-376)."

Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F. 2d 529;

Haile v. Saunooke, 148 Fed. Supp. 604, Aff'd. 246 F. 2d 293, Cert. denied 78 S. Ct. 268 (1957).

VI.

Indian Tribes may not be sued without their consent thereto, and this proceeding should be dismissed *sua sponte* since the Mojave Indians are an indispensable party who were never joined, and who do not consent to be sued.

Turner v. United States, 248 U.S. 354 (1919);

United States v. U.S. Fidelity & Guar. Co., 106 F. 2d 804 (1939), 309 U.S. 506 (1940).

See also:

United States v. McShan v. Sherrill, 283 F. 2d 462 (1960);

Partan, et al., 132 F. 2d 886 (1943), on the status of a tribe;

United States v. Sherwood, 312 U.S. 584 (1941);

United States v. Shaw, 309 U.S. 495 (1940);

Minnesota v. United States, 305 U.S. 382 (1939).

VII.

There can be no waiver of an Indian tribe's immunity fom suit. This proposition of law was quite graphically illustrated in *United States v. United States Fidelity & Guaranty Co.,* 60 S. Ct. 653, at 657, 309 U.S. 506 at 514, wherein the Court said:

"the reasons for the conclusion that this immunity may not be waived govern likewise the ques-

tion of res judicata. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body."

It is clearly apparent that in the instant case the Fort Mojave Indian Tribe must be deemed an indispensable party; that they have not consented to be sued, and that this Court's decision of March 24, 1971, in the Water Division No. 5, Case No. 812, should therefore be vacated and a dismissal of the action ordered *sua sponte* by reason of lack of jurisdiction.

RAYMOND C. SIMPSON,
Tribal Attorney.

The hereinafter named Indian Tribes represented by Raymond C. Simpson also concur with the Fort Mojave Indian Tribe and do hereby join them in this proceeding on behalf of themselves and all other Indian tribes who may be similarly situated.

The Agua Caliente Band of Mission Indians at Palm Springs, California.

The Cabazon Band of Mission Indians at Indio, California.

The Quechan Indian Tribe at Yuma.

Map of T[illegible]e

COLORADO RI[illegible]ER BASIN

ARIZONA V. CALIFORN[illegible]A [373 US 602]

TO WHICH THERE IS ADDED
THE EAGLE RIVER WATER DISTRICT NO. 37
COLORADO WATER DI[illegible]ISION NO. 5
AND INDIAN RESERVATION ON THE MAIN STEM
OF THE COLORADO RIVER, THE GREEN RIVER AND
THE SAN JUAN RIVER AND THEIR TRIBUTARIES.

[illegible]REAU OF INDIAN AFFAIRS
[illegible]OENIX AREA OFFICE
[illegible]OWER MAR. 14, 1971

PLATE I

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* DISTRICT COURT IN AND FOR WATER DIVISION NO. 5 ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 812. Argued March 2, 1971—Decided March 24, 1971

In this companion case to *U. S.* v. *District Court for Eagle County*, *ante*, p. —, the United States had been served with notice pursuant to 43 U. S. C. § 666 of a proceeding in state court for the adjudication of water rights affecting areas of the State in the drainage basin of the Colorado River system. In addition to its claim that § 666 does not apply to state court suits against the Government for adjudication of its reserved water rights, the Government contended that the state statutory proceedings involved in this case, which contemplated monthly proceedings before a water referee on water rights applications filed within a particular month, do not constitute general adjudications of water rights under § 666 because all the water users and all water rights on a stream system are not implicated in the referee's determinations. The Government's contentions were rejected by the state courts. *Held:*

1. The state court has jurisdiction to adjudicate the reserved water rights of the United States. *Eagle County*, *supra*. P. 2.

2. The state statutory proceedings are within the scope of § 666 and reach all claims in their totality, although the adjudication is made on a monthly basis. Pp. 2–3.

Affirmed.

MR. JUSTICE DOUGLAS delivered the opinion for a unanimous Court. MR. JUSTICE HARLAN, though joining in the opinion, filed a concurring statement.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 812.—October Term, 1970

United States, Petitioner, *v.* The District Court in and for Water Division No. 5, State of Colorado, et al. | On Writ of Certiorari to the Supreme Court of Colorado.

[March 24, 1971]

Mr. Justice Douglas delivered the opinion of the Court.

This is a companion case to the *Eagle County* case and involves an action brought under a different state statute [1] in the District Court of Colorado for Water Division No. 5.[2] That Court was given responsibility for water rights determinations affecting ". . . all lands in the State of Colorado in the drainage basins of the Colorado River and all of its tributaries arising in Colorado, with the exception of the Gunnison River," [3] which includes the area of the Eagle River system.

Notice was served on the United States pursuant to 43 U. S. C. § 666 (b) and it moved to quash the service. That motion was denied. A writ of prohibition was sought in the Supreme Court and it was also denied. The case is here on a petition for a writ of certiorari which we granted. 400 U. S. 940.

[1] The Colorado Water Rights Determination and Administration Act of 1969, Colo. Rev. Stat. § 148-21-1 *et seq.*, Colo. Rev. Stat. § 148-21-18 (3).

[2] The 1969 Act here in question abolished the 70 water districts previously existing and replaced them with seven water divisions.

[3] *Id.* § 148-21-8 (6).

The area covered by this suit includes vastly more water rights than those involved in the *Eagle County* case. The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior, through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife, make use of water in Water Division No. 5 for national recreational and other purposes. The Department of the Navy administers certain Naval Petroleum and Oil Reserves which, if ever developed, would require water to accomplish the federal purpose for which the reservation was made.

The major issue—the scope of the consent to be sued provision in 43 U. S. C. § 666—has been covered in the *Eagle County* opinion and need not be repeated here.

It is emphasized, however, that the new procedures under the new Act are much more burdensome on the government than they were under the older Act. It is pointed out that the new statute contemplates monthly proceedings before a water referee on water rights applications. These proceedings, it is argued, do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. It is also said that the Act makes all water rights confirmed under the new procedure junior to those previously awarded.

It is argued from the those premises that the proceeding does not constitute a general adjudication which 43 U. S. C. § 666 contemplated As we said in the *Eagle County* case, the words "general adjudication" were used

in *Dugan* v. *Rank*, 372 U. S. 609, 618, to indicate that 43 U. S. C. § 666 does not cover consent by the United States to be sued in a private suit to determine its rights against a few claimants. The present suit, like the one in the *Eagle County* case, reaches all claims, perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review.

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 87 AND 812.—OCTOBER TERM, 1970

United States, Petitioner, 87 *v.* The District Court in and for the County of Eagle and State of Colorado et al. United States, Petitioner, 812 *v.* The District Court in and for Water Division No. 5, State of Colorado, et al.	On Writ of Certiorari to the Supreme Court of Colorado.

[March 24, 1971]

MR. JUSTICE HARLAN, concurring.

I join in the opinions of the Court in these cases, explicitly disclaiming, however, the intimation of any view as to the existence and scope of the so-called "reserved water rights" of the United States, either in general or in the particular situations here involved.